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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

E. I. DU PONT DE NEMOURS & COMPANY,

Petitioner,

v.

GRASSELLI EMPLOYEES INDEPENDENT ASSOCIATION OF EAST CHICAGO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

What is the scope of the public policy grounds on which a court may vacate an arbitration award?

What is the proper standard of review of arbitral findings of fact where a court is considering whether to vacate an award on public policy grounds?

PARTIES TO THE PROCEEDING BELOW

All parties to the proceedings below subject to this petition for writ of certiorari are set forth in the caption of the petition.

A listing, as required by Supreme Court Rule 28.1, is provided in Appendix D, *infra*.

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IN THE

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OCTOBER TERM, 1986

E. I. DU PONT DE NEMOURS & COMPANY,

Petitioner,

v.

GRASSELLI EMPLOYEES INDEPENDENT ASSOCIATION OF EAST CHICAGO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, E. I. Du Pont De Nemours & Company, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 9, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 790 F.2d 611 (7th Cir. 1986). The opinion of the United States District Court for the Northern District of Indiana (Appendix B) is not officially reported. It is unofficially reported at 118 L.R.R.M. (BNA) 3312 (N.D. Ind. 1985).

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This case arises under Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) is the subject matter of the questions for review. That statute provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE[1]

Willie McClendon was employed in the Sulfamic Department of Du Pont's East Chicago, Indiana chemical plant. On December 26, 1977, McClendon, while naked, violently assaulted Supervisor Ralph Beiriger and fellow employee Ronald Fletcher and damaged the employee locker room in the amount of approximately one thousand dollars. He then ran throughout the chemical plant and intentionally engaged in other dangerous acts which, but for Fletcher's intervention, could have caused a violent chemical reaction. Based on McClendon's conduct, Du Pont terminated his employment on December 29, 1977.

The Union filed a grievance regarding McClendon's discharge which was submitted to arbitration on March 20, 1979. In an Award issued on September 25, 1979, the Arbitrator,[2] Robert G. Howlett, plainly found that McClendon had violently attacked his supervisor and a fellow employee, had destroyed company property, and had engaged in unsafe practices but, nevertheless, set aside McClendon's termination and reinstated him. That decision was based primarily on Howlett's determination that McClendon was not "at fault" for this action, because he was suffering from a mental or emotional breakdown of unknown origin at that time. At several points within his decision, Howlett declared that it was unlikely that McClendon's violent, destructive and unsafe conduct would reoccur (*see* App. C-21, -28). That finding was based

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[1] The procedural background of this case is set forth in considerably greater detail in the Seventh Circuit's opinion below (*see* App. A, *infra,* at A-2 to -3).

[2] Article XI of the parties' collective bargaining agreement provided for a three-member arbitration panel. Pursuant to that provision, the Union appointed Kenneth Tucker as its representative, and the Company appointed Owen Fairweather. Those arbitrators then jointly chose Robert G. Howlett as the neutral arbitrator.

on: (1) his apparent conclusion that Dr. Polydefkis'[3] testimony to the effect "I am not saying this cannot reoccur" was unworthy of credit because "it was brought out on re-cross examination" "without [Polydefkis'] being asked";[4] (2) his claim that neither Counsel had explored whether McClendon had continued treatment, as Dr. Polydefkis had recommended;[5] and (3) his notation that McClendon had successfully performed the responsibilities of his new job for some eleven months prior to the arbitral hearing with no evidence of a problem (App. C-28).[6]

---

[3] Dr. Polydefkis was McClendon's primary treating physician during McClendon's stay at the hospital immediately following the incident.

[4] In addition to concluding that the above testimony was unworthy of credit merely because it was voluntary and proffered during re-cross examination, Howlett completely ignored other testimony that directly conflicted with his "remote likelihood" finding. Thus his award neither referred to, nor attempted to reconcile, the following exchange between Du Pont advocate Mitchell and Dr. Polydefkis:

> Q: [by Mitchell] And is it your testimony also that this could recur?
>
> A: [by Polydefkis] I said it to [McClendon] and the family, and I have it on my notes, that yes, he needed continued therapy to reduce this stress. I believe, and I can say that that—that Mr. McClendon can go into that predicament again.

(Arbitration Transcript at 145-46).

[5] In making this claim, Howlett completely ignored the following admission by McClendon:

> Q: [by Macey] Now, then there was testimony from Dr. Polydefkis that he had recommended to you some follow up treatment. Did you after you saw Dr. Espindola in March, did you have any further treatment?
>
> A: [by McClendon] No, I did not.

(Arbitration Transcript at 196).

[6] Howlett relied upon McClendon's purportedly successful job performance for his "remote likelihood" finding despite the fact that the record was barren of information regarding either the relative stresses of McClendon's new job *vis-a-vis* his former job at Du Pont or his outside pressures during that period.

Du Pont brought suit in district court to set aside Arbitrator Howlett's award. On March 5, 1985, the district court vacated the award, finding *inter alia* that its enforcement would violate the public policy regarding an employer's legal responsibility to maintain a safe work environment (App. B-9 to -10).

On appeal, the Seventh Circuit reversed the district court, holding *inter alia* that enforcement of the award would not violate the public policy regarding safety in the workplace (App. A-6 to -11). In so holding, the majority relied entirely upon Arbitrator Howlett's finding that the likelihood of recurrence of McClendon's violent conduct was remote (App. A-9 to -10). In response to Plaintiff's argument that that finding was not supported by the record, the majority first noted that "[t]he appropriate standard of review for a factual finding such as this which pertains to a public policy exception has not yet been judicially established," and then went on to discuss the possible application of two standards: (1) the extremely deferential standard applied to arbitral findings of fact not under the public policy exception; (2) the less deferential, "clearly erroneous" standard (App. A-10). The majority concluded, however, that it need not decide "the precise legal standard for reviewing a factual finding that pertains to a public policy exception" because "even under the less deferential clearly erroneous standard of review, the arbitrator's factual finding that the likelihood of a future breakdown by McClendon is remote must be accepted" (*Id.*).

In a separate concurrence, Judge Easterbrook held: (1) that the public policy exception may be invoked only where the arbitration award violates positive law; (2) that arbitral findings of fact should not be reviewed any more liberally under a public policy analysis than they would otherwise be reviewed; (3) that reversal of an arbitration award is appropriate where "no rational firm" would adopt a contract clause authorizing the arbitrator's rationale (App. A-11 to -17).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. THE SEVENTH CIRCUIT'S REFUSAL TO VACATE THE ARBITRATOR'S AWARD ON PUBLIC POLICY GROUNDS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

A. As Recent Decisions Reveal, There Is Considerable Conflict Among The Circuits Regarding The Public Policy Grounds On Which An Arbitration Award May Be Vacated

In *W.R. Grace & Co.* v. *Local 759, International Union of United Rubber Workers,* 461 U.S. 757, 766 (1983), this Court held that an arbitration award may not be judicially enforced if such enforcement would violate public policy. Federal circuit courts have recognized this "public policy exception" for more than twenty years, *see, e.g., Local 453, International Union of Electrical Workers* v. *Otis Elevator Co.,* 314 F.2d 25, 29 (2d Cir.), *cert. denied,* 373 U.S. 949 (1963), but have diverged in their approach to its application. Thus, in *Local No. P-1236, Amalgamated Meat Cutters & Butcher Workmen* v. *Jones Dairy Farm,* 680 F.2d 1142, 1143-45 (7th Cir. 1982), the Seventh Circuit took a broad approach to the public policy exception and held that an arbitration award need only violate general public policy for the exception to apply. Conversely, in *Kane Gas Light & Heating* v. *International Brotherhood of Firemen,* 687 F.2d 673, 681 (3rd Cir. 1982), *cert. denied,* 460 U.S. 1011 (1983), the Third Circuit took a narrow approach and held that the public policy exception is invoked only when an arbitration award "conflicts directly with federal or state law." *Accord Amalgamated Transit Union* v. *Aztec Bus Lines,* 654 F.2d 642, 644 (9th Cir. 1981).

This conflict among the circuits has extended into the post-*Grace* period, despite this Court's seemingly clear mandate in that case that the public policy necessary to prevent en-

forcement of an arbitration award "must be well defined and dominant and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.' " *W.R. Grace,* 461 U.S. at 766 (*quoting Muschany* v. *United States,* 324 U.S. 49, 66 (1945)). Indeed, courts of appeals in different circuits have relied upon precisely that language from *Grace* to derive substantially different and conflicting approaches to the public policy exception. *Compare Amalgamated Meat Cutters, Local 540* v. *Great Western Food Co.,* 712 F.2d 122, 124-25, *rehearing denied,* 717 F.2d 1399 (5th Cir. 1983) (broad approach—relying upon *Grace* and holding that arbitration award need only violate general public policy against drinking and driving for public policy exception to apply)[7] *with American Postal Workers* v. *United States Postal Service,* 789 F.2d 1, 8-9 (D.C. Cir. 1986) (narrow approach—relying upon *Grace* for proposition that public policy exception applies only when the award transgresses well defined "laws and legal precedents") *and E. I. DuPont De Nemours* v. *Grasselli Employees Indep. Assoc. of East Chicago Inc.,* 790 F.2d 611, 620 (7th Cir. 1986) (Easterbrook, J. concurring) (narrow approach—relying upon *Grace* for proposition that public policy exception applies only when "contract, as construed, violates positive law"). *Compare also United States Postal Service* v. *National Association of Letter Carriers, AFL-CIO,* 631 F. Supp. 599, 600-02 (D.D.C. 1986) (relying

[7] As the First Circuit later noted, although the court in *Great Western Food* did cite cases which would have been directly contravened by enforcement of the arbitrator's award, "the opinion [made] it clear that the court relied primarily on the general policy against drinking and driving" for its conclusion that the award should not be enforced. *United States Postal Service v. American Postal Workers Union,* 736 F.2d 822, 824 (1st Cir. 1984).

For cases which have applied the broad approach to the public policy exception without specifically relying upon *W. R. Grace,* see *Misco, Inc. v. United Paperworkers International Union,* 768 F.2d 739 (5th Cir. 1985); *United States Postal Service v. American Postal Workers Union, AFL-CIO,* 736 F.2d 822, 824 (1st Cir. 1984).

upon *Grace* for broad approach); *with S.D. Warren* v. *United Paperworkers International Union,* No. 85-0321-P (D. Me. April 2, 1986) (attached hereto as Appendix E) (relying upon *Grace* for narrow approach) *and National Rural Letter Carriers* v. *United States Postal Service,* 625 F. Supp. 1527, 1530 (D.D.C. 1986) (same; expressly noting split among circuits).

The lack of a clearly articulated standard for applying the public policy exception has resulted in chaos among the circuits. For example, in the area of public safety, the Fifth Circuit has ruled that an arbitration award ordering a company to reinstate an over-the-road truck driver caught drinking liquor on duty violated the "public policy of preventing people from drinking and driving." *Great Western Food,* 712 F.2d at 124-25. The obvious reason behind that ruling was the court's finding that "[a] driver who imbibes the spirits endangers not only his own life, but [also] the health and safety of all other drivers." *Id.* at 124. In *Amalgamated Transit Union* v. *Aztec Bus Lines,* 654 F.2d 642 (9th Cir. 1981), however, the Ninth Circuit refused to vacate an arbitrator's award ordering reinstatement of a bus driver who knowingly drove a bus with faulty brakes (causing the bus to "dive and rock"), despite the fact that the driver had been involved in a number of accidents and mishaps during his first year of employment and the fact that the arbitrator had expressly found that the driver "exhibited extremely poor judgment." *Id.* at 643.

It can hardly be argued that the public safety concerns in *Aztec Bus Lines* were any less compelling than the concerns in *Great Western Foods.* However, because the Ninth Circuit applied the narrow approach to the public policy exception, *Aztec Bus Lines,* 654 F.2d at 644 ("no California statute has been called to our attention which would make it illegal to employ bus drivers who have previously shown bad judgment"), while the Fifth Circuit applied the broad approach (*see* discussion, *supra),* the two circuits arrived at opposite holdings, despite the virtual identity of the factual situations

presented to them. *Compare also Misco, Inc.* v. *United Paperworkers International Union,* 768 F.2d 739 (5th Cir. 1985) (applying broad approach to public policy exception and holding that arbitrator's award reinstating employee discharged for violating employer's substance abuse rule (marijuana) must be vacated as violative of public policy against operating dangerous machinery while under the influence of drugs or alcohol) *with S.D. Warren* v. *United Paperworkers International Union,* No. 85-0321-P (D. Me. April 2, 1986) (App. E-12 to -16) (applying narrow approach to public policy exception and holding that arbitrator's award reinstating employees discharged for violating employer's substance abuse rule (marijuana) did not violate type of public policy necessary to prevent enforcement of award, despite potential ramifications of having employees operate dangerous machinery while under the influence of drugs or alcohol).[8]

A similar conflict has arisen regarding application of the public policy exception to arbitration awards reinstating employees discharged for their involvement in criminal activity. In *United States Postal Service* v. *American Postal Workers Union,* 736 F.2d 822 (1st Cir. 1984), the First Circuit, applying the broad approach to the public policy exception, refused to enforce an arbitration award reinstating a postal employee who had been discharged because of his conviction for embezzling postal funds. In so holding, the court relied upon the "common sense implications that requiring the rehiring of [the employee]

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[8] The court in *S.D. Warren* explicitly rejected the approach to the public policy exception taken by the Fifth Circuit in *Misco,* stating that:

> *Misco's* description of the risks to workplace safety when the dangerous machinery involved in that case and this case is used by those under the influence of drugs or alcohol involves "general consideration [sic] of supposed public interest" rather than the explicit laws and legal precedents required by *W.R. Grace.*

S.D. Warren, No. 85-0321-P (App. E-15).

would have on other postal employees and on the public in general":

> Other postal employees may feel there is less reason for them to be honest than they believed—the Union could always fix it if they were caught. Moreover, the public trust in the Postal Service, and in the entire federal government, could be diminished by the idea that graft is condoned.

Id. at 825.

Totally ignoring these "common sense implications," the District of Columbia Circuit refused to vacate an arbitration award reinstating an employee who had been discharged for his admitted dishonesty (his apparent conversion of postal funds to personal use) in handling postal transactions. *American Postal Workers* v. *United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986). It can hardly be argued that *American Postal Workers* is distinguishable from *United States Postal Service* on grounds that the negative implications of "requiring the rehiring" of an employee discharged for his admitted dishonesty in postal transactions are any less severe than the negative implications of requiring the reinstatement of an employee convicted of embezzling postal funds.[9] However, because the D.C. Circuit

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[9] Moreover, the D.C. Circuit's attempt to distinguish *American Postal Workers* from the First Circuit's *United States Postal Service* decision on grounds that the employee in *United States Postal Service* was convicted of his dishonest postal transactions, while the employee in *American Postal Workers* was acquitted (on *Miranda* grounds), directly conflicts with the Second and Seventh Circuit's holdings in *Local 453, International Union of Electrical Workers* v. *Otis Elevator Company*, 314 F.2d 25, 29 (2d Cir. 1963), and *International Ass'n of Mach., Dist. No. 8* v. *Campbell Soup Co.*, 406 F.2d 1223, 1227 (7th Cir. 1969). In those cases, the court held that conviction, and the attendant imposition of criminal sanctions, provided grounds for enforcing an arbitration award, not for vacating it. *See Otis Elevator*, 314 F.2d at 29; *Campbell Soup*, 406 F.2d at 1227. Accordingly, if one

(Footnote continued on following page.)

adopted the narrow approach to the public policy exception, *American Postal Workers,* 789 F.2d at 8-9 (public policy exception not applicable because there is no legal proscription against reinstating an employee who admittedly has engaged in dishonest postal transactions), while the First Circuit applied the broad approach, *United States Postal Service,* 736 F.2d at 824-25 (public policy exception applicable despite fact that there is no legal proscription against reinstating an employee convicted of embezzling postal funds), the two circuits arrived at opposite holdings despite their consideration of virtually identical factual situations.

It is clear from the cases discussed above that application of the public policy exception is far from consistent. Indeed, it appears that under the current state of the law, such application depends more upon the circuit in which the case is brought than the particular facts the case presents. Accordingly, Plaintiff submits that its petition for certiorari should be granted so that this serious conflict among the circuits can be resolved.

B. The Seventh Circuit's Decision Below Exemplifies That Conflict And Directly Conflicts With The Decisions Of The Fifth Circuit

Below, the Seventh Circuit held that Arbitrator Howlett's reinstatement of McClendon did not violate the public policy favoring safety in the workplace because the likelihood of

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(Footnote continued from preceding page.)

accepts the reasoning of *Otis Elevator* and *Campbell Soup,* one must conclude that an irreconcilable conflict exists between *American Postal Workers* and *United States Postal Service,* inasmuch as the D.C. Circuit's attempt to distinguish the two cases on acquittal/conviction grounds is inadequate. On the other hand, if one accepts the conviction/acquittal distinction made by the D.C. Circuit, one must conclude that an irreconcilable conflict exists between *American Postal Workers* and *Otis Elevator/Campbell Soup,* inasmuch as under the reasoning of the latter cases, the fact that the employee was acquitted in *American Postal Workers* should have provided grounds for vacating the award, not for enforcing it.

recurrence of McClendon's violent conduct was remote. App. A-9 to -10. This "crystal ball" approach to the public policy exception, whereby Du Pont's decision to discharge McClendon on December 29, 1977 was evaluated based upon McClendon's experiences between that date and the March 20, 1979 arbitration hearing, directly conflicts with the approach taken by the Fifth Circuit in *Amalgamated Meat Cutters, Local 540 v. Great Western Food Company,* 712 F.2d 122 (5th Cir. 1983), and *Misco, Inc. v. United Paperworkers International Union,* 768 F.2d 739 (5th Cir. 1985), inasmuch as those cases make it clear that the critical issue in determining whether to apply the public policy exception is the employee's *prior* conduct, not an arbitral or judicial prediction of what that employee may or may not do in the future.

Thus, in *Great Western Food,* the Fifth Circuit held that an arbitrator's award reinstating an over-the-road truck driver caught drinking while on duty violated the public policy against drinking and driving based upon that singular instance of drinking while on duty. 712 F.2d at 123-25. Similarly, in *Misco,* the court focused entirely upon the employee's prior conduct in making its determination that the arbitration award reinstating that employee violated the public policy against operating dangerous machinery while under the influence of drugs or alcohol. 768 F.2d at 740-43. In both cases, the likelihood of recurrence of the employee's conduct was irrelevant to the court's disposition of the case. It was sufficient, for purposes of the public policy exception, that the employee had, in the past, engaged in potentially life-threatening conduct.

It seems clear, at least in the area of public safety, that the Fifth Circuit's approach to the public policy exception is far superior to the approach taken by the Seventh Circuit. By focusing solely upon an employee's prior conduct, the Fifth Circuit avoids the speculation necessarily engendered by an arbitral or judicial attempt to predict the likelihood that an

employee who has once engaged in life-threatening conduct will do so again. More importantly, the Fifth Circuit's approach has the undeniable virtue of avoiding the dire consequences which could result from an inaccurate arbitral or judicial prediction. As one court noted in regard to the Fifth Circuit's *Great Western Food* decision:

> Obviously, discharge in that case served a vital prophylactic purpose. . . . A death caused by drunk driving would be irreparable.

Wyman-Gordon Co. v. *United Steelworkers of America,* 613 F. Supp. 626, 633 (N.D. Ill. 1985). Accordingly, Plaintiff urges the Court to grant certiorari and adopt the approach applied by the Fifth Circuit.

II. THE STANDARD OF REVIEW FOR AN ARBITRAL FINDING OF FACT UNDER THE PUBLIC POLICY EXCEPTION IS AN IMPORTANT ISSUE THAT HAS NOT BEEN EXPRESSLY ESTABLISHED

The appropriate standard of review for an arbitral finding of fact under the public policy exception has not been expressly established. *Cf. E. I. DuPont De Nemours* v. *Grasselli Employees Indep. Assoc. of East Chicago,* App. A-10. This issue is of critical importance because it lies at the heart of the delicate balance federal courts are attempting to forge between the strong congressional policy of encouraging peaceful resolution of labor disputes by means of binding arbitration, *see United Steelworkers of America* v. *Warrior & Gulf Navigation Company,* 363 U.S. 574 (1960), and the important societal interests protected by the public policy exception. As the Seventh Circuit noted in the context of the case below:

> On the one hand, plaintiff's attack on this factual finding can be viewed as an end-run around the normal extreme judicial deference to arbitral fact-finding. Under this view

> a court would apply the same extremely deferential standard of review to this type of factual finding as with all arbitral factual findings. On the other hand, this kind of factual finding is different because it pertains to a public policy exception. An arbitral award is not to be enforced if it violates public policy, and this duty would be impaired if a court had to defer to clearly erroneous factual findings made by the arbitrator. Viewed in this light, a less deferential standard of review such as the "clearly erroneous" standard embodied in Fed. R. Civ. P. 52(a) might be more appropriate with respect to this type of factual finding.

App. A-10.

Indeed, a recent Fifth Circuit decision suggests that an even less deferential standard of review than the "clearly erroneous" standard is appropriate for reviewing factual findings under the public policy exception. *See Misco, Inc.* v. *United Paperworkers International Union,* 768 F.2d 739 (5th Cir. 1985). In that case, the court not only re-found facts originally found by the arbitrator, 768 F.2d at 741, 742, 743 (rejecting arbitrator's finding that the employee had not violated employer's substance abuse rule),[10] but also indicated that, at least in certain circumstances, it would be appropriate for the reviewing court to make new findings of fact, 768 F.2d at 743 ("[i]ndeed, even had the arbitrator not known of that fact at the time he entered his award, it is doubtful that the award should be enforced today in light of what is now known").

Plaintiff submits that adoption of the non-deferential standard of review applied by the Fifth Circuit in *Misco* is necessary to protect the important societal interests at issue in cases

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[10] The Seventh Circuit's reliance below upon *Misco* for the proposition that "[w]here an arbitration award has been overturned on public policy considerations, the court has not questioned the factual findings of the arbitrator" is thus incorrect. *See E. I. DuPont De Nemours,* App. A-7.

arising under the public policy exception. The need for such a standard is particularly apparent in the area of public safety, where an arbitrator's erroneous findings could result in potentially life-threatening situations. Accordingly, Plaintiff urges the Court to grant certiorari and adopt the non-deferential standard of review applied by the Fifth Circuit. Plaintiff submits that under that standard, Arbitrator Howlett's "remote likelihood" finding would have to be rejected.[11]

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[11] Indeed, it is Plaintiff's position that even under the less deferential "clearly erroneous" standard, Arbitrator Howlett's finding would have to be rejected. Not only is the arbitral record upon which Howlett based his finding completely devoid of evidence supporting that finding, but also the record plainly contains affirmative evidence supporting a finding to the contrary (*see* Statement of the Case, *supra*).

CONCLUSION

For the reasons stated above, a writ of certiorari should issue and the decision below should be reversed.

Respectfully submitted,

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APPENDICES

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1577

E.I. DuPont de Nemours and Co.,

Plaintiff-Appellee,

v.

Grasselli Employees Independent Assoc. of East Chicago, Inc.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 79 C 493—Michael S. Kanne, *Judge.*

Argued December 10, 1985—Decided May 9, 1986

Before Cummings, *Chief Judge*, Posner and Easterbrook, *Circuit Judges.*

Cummings, *Chief Judge.* This appeal comes to us from a decision by the district court to deny a motion by defendant Grasselli Employees Independent Association of East Chicago, Inc. ("defendant") to enforce an arbitrator's award against plaintiff E.I. DuPont de Nemours and Company ("plaintiff"). This case requires us to discuss the proper standard of review of an arbitrator's decision and to apply that standard. For the reasons set forth below, we reverse the decision of the district court and order that the arbitration award be enforced.

I

The controversy at issue involves the discharge of Willie McClendon by plaintiff on December 29, 1977. McClendon had been working the night shift (11:30 PM—7:30 AM) at plaintiff's plant for several days prior to the morning of December 26, 1977, and did not have any sleep before starting the late shift for December 25-26. At the end of that shift (*i.e.*, on the morning of December 26), McClendon had made arrangements with his supervisor Ralph Beiriger to meet him at the employee change house and to drive him to the front gate. However, when Beiriger came by to meet McClendon at 8:00 AM, McClendon was sitting naked in the change house and was not ready to leave. Beiriger stopped by at 8:30 AM and again at 9:00 AM, but McClendon was still naked and not ready to leave. Then, without any apparent provocation, McClendon flew into a rage. McClendon attacked Beiriger and damaged company property. McClendon, still naked, then ran into another building, where he struck an operator and attempted to create a chemical reaction that could have caused further damage. McClendon was finally subdued by police.

McClendon was admitted to the psychiatric ward of a hospital where he remained for more than thirty days. He took drug tests immediately after admission on December 26, and they were positive for both amphetamines and barbiturates. Three days later, the same tests were performed on McClendon and were negative. Physicians later testified that the initial tests could have been a false positive in view of the subsequent negative test and the fact that drugs remain in a person's system for three to four days. On December 29, McClendon was officially discharged for assaulting fellow employees and destroying company property. He was hospitalized for thirty days and has not been treated subsequently.

Pursuant to the collective bargaining agreement, defendant filed a grievance protesting McClendon's discharge. The grievance was denied by plaintiff, and the parties pro-

ceeded to submit the dispute to arbitration as required by the union contract. The critical issue at arbitration was whether McClendon was discharged for "just cause."

The arbitrator heard testimony that the incident could have been caused by drugs taken by McClendon or by his mental or nervous breakdown. The arbitrator weighed the evidence and concluded that McClendon suffered a mental breakdown, did not misuse drugs, and that the likelihood of McClendon's having a future breakdown was remote. The arbitrator reasoned that lack of fault must be considered in determining just cause for discharge, and that since McClendon's outburst was caused by a mental breakdown rather than drug use, he was not at fault for his outburst, and thus just cause was not established. The arbitrator considered the danger to other employees and company property posed by the continued employment of McClendon but concluded that these concerns were not significant because he found the likelihood of a future breakdown by McClendon to be remote. Additionally, the arbitrator noted that his conclusion of no just cause was buttressed by plaintiff's failure to follow its own procedural policy since it discharged McClendon without conducting a full investigation and giving him the opportunity to present his side of the story. Based on all of the above, the arbitrator reversed the discharge of McClendon and ordered him reinstated, though without compensation for lost wages for the twenty-one months between McClendon's discharge and his reinstatement.

The district court vacated the arbitrator's award. The district court stated that the arbitrator premised his decision on McClendon's lack of fault without equal consideration of safety in the workplace, and that this indicated that the arbitrator was enforcing his own notions of equity instead of the collective bargaining agreement. The court dismissed the procedural irregularities noted by the arbitrator as irrelevant to the determination of just cause. Finally, the court noted that public policy concerns regarding the safety of the workplace supported its decision to vacate the arbitrator's award.

II

At the outset, it should be stressed that judicial review of an arbitration award is extremely limited. *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir. 1986); *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Keystone Consolidated Industries, Inc.*, 782 F.2d 1400, 1402 (7th Cir. 1986); *Ethyl Corporation v. United Steelworkers of America*, 768 F.2d 180, 183 (7th Cir. 1985), certiorari denied, 106 S. Ct. 1184. With other deferential standards of review, we still review the merits of the question or issue decided below, but must be very certain that the decision below was erroneous before we reverse that decision. See, *e.g.*, Fed. R. Civ. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous . . . ."). When reviewing an arbitration award, however, the standard of review is even more deferential, since the judiciary has no power to reach and determine the merits of arbitration awards merely because of disagreement, even strong disagreement, with the arbitrator's interpretation of the contract. As here, so long as the arbitrator interpreted the contract in making his award, his award must be affirmed even if he clearly misinterpreted the contract. *Keystone Consolidated*, 782 F.2d at 1402; *Ethyl Corporation*, 768 F.2d at 184, 186. An award may be overturned only if the arbitrator must have based his award on his own personal notions of right and wrong, for only then does the award fail to "draw its essence from the collective bargaining agreement" as required by the Supreme Court in *United Steelworkers v. Enterprise Wheel*, 363 U.S. 593, 597, and by ourselves in *Ethyl Corporation*, 768 F.2d at 184-185; *Jones Dairy Farm v. Local No. P-1236, United Food and Commercial Workers International Union*, 760 F.2d 173, 176 (7th Cir. 1985), certiorari denied, 106 S. Ct. 136; *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), certiorari denied, 105 S. Ct. 912. See generally R. Gorman, LABOR LAW—UNIONIZATION AND COLLECTIVE BARGAINING 584-586 (1976); Note, *Judicial Review of Labor Arbitration Awards*:

Refining the Standard of Review, 11 Wm. Mitchell L. Rev. 993, 995, 998 (1985).

This low standard of review is essential to prevent a "judicialization" of the arbitration process. *Ethyl Corporation*, 768 F.2d at 184. Arbitration is an alternative to the judicial resolution of disputes, and an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative. *Id.* The parties have bargained *ex ante* for arbitration as an alternative means of dispute resolution, and *ex post* they must abide by this bargain. *Camacho*, 786 F.2d at 244.

Given this standard of review, it cannot be said that this arbitrator based his award on his own personal notions of right and wrong rather than on an interpretation of the contractual phrase "just cause." The key to the arbitrator's award was his reasoning that the plaintiff lacked just cause to terminate McClendon because he was not at fault for his conduct. This notion of fault analysis as part of a just cause determination is not a novel concept based on the personal whims of a single arbitrator; the same concept has been applied by several other arbitrators. See, *e.g.*, *Johns-Manville Perlite Corp.*, 67 L.A. 1255, 1260 (1977); *Brown & Williamson Tobacco Corp.*, 60 L.A. 17, 22 (1972); *Silas Mason Co.*, 59 L.A. 197, 200 (1972); *Consolidated Foods Corp.*, 58 L.A. 1285, 1288 (1972). Similarly, the idea that the right to be discharged only if there is just cause contains certain procedural guarantees which were not met in the instant case is not so far-fetched that it could fairly be said that the arbitrator was not interpreting "just cause" in the contract when he applied this concept. See, *e.g.*, *Whirlpool Corp.*, 58 L.A. 421, 427 (1972). In other words the arbitrator in the instant case did not apply "his own brand of industrial justice," *Steelworkers*, 363 U.S. at 597. While this Court does not necessarily agree with the arbitrator's conceptions of just cause, mere disagreement does not allow an overturning of the award.

Plaintiff contends that the arbitrator failed to give sufficient consideration to safety in the workplace. We disagree. First, he did not ignore workplace safety. Indeed he explicitly considered danger to company employees and property but concluded that these dangers were not significant since the likelihood of a future mental breakdown by McClendon is remote (Arbitrator's Award, pp. 25, 41). Second, and more significantly, since the arbitrator was interpreting "just cause" in the contract, we are not empowered to review either his factual finding that the likelihood of a future mental breakdown by McClendon is remote or his judgment that the remoteness of a future breakdown by McClendon renders any possible danger to workplace safety inconsequential.[1]

Plaintiff further contends that the enforcement of this arbitration award would violate public policy, specifically the public policy of providing a safe working environment as illustrated by various provisions of the Occupational Safety and Health Act. 29 U.S.C. §§ 651(b), 654. Of course we should overturn an arbitration award if it violates public policy. *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766; *Keystone Consolidated*, 782 F.2d at 1403; *Local No. P-1236, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jones Dairy Farm*, 680 F.2d 1142, 1144-1145 (7th Cir. 1982); *Wyman-Gordon Co. v. United Steelworkers of America*, 613 F. Supp. 626, 632 (N.D. Ill. 1985). Unlike a review of the merits of the award itself, where, as illustrated above, there must be strong deference to the arbitrator, the question of whether the award violates public policy "is ultimately one for resolution by the courts." *W.R. Grace*

[1] Plaintiff essentially resurrects its challenges to both the arbitrator's factual finding that the likelihood of a future mental breakdown by McClendon is remote and the arbitrator's judgment that this remote chance of future harm to other employees and company property does not warrant the discharge of McClendon as a public policy argument. These two challenges are discussed further below.

& Co., 461 U.S. at 766; *Wyman-Gordon Co.*, 613 F. Supp. at 632. However, the public policy must be "well-defined and dominant" to justify a refusal to enforce the award on public policy grounds. *W.R. Grace & Co.*, 461 U.S. at 766; *Keystone Consolidated*, 782 F.2d at 1403; *Wyman-Gordon Co.*, 613 F. Supp. at 632. Precisely because this doctrine allows courts to by-pass the normal heavy deference accorded to arbitration awards and potentially to "judicialize" the arbitration process, the judiciary must be cautious about overruling an arbitration award on the ground that it conflicts with public policy. *Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir. 1984); *Amalgamated Transit Union, AFL-CIO Local Division 1309 v. Aztec Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981). See *Keystone Consolidated*, 782 F.2d at 1403; *Amalgamated Meat Cutters, Local 540 v. Great Western Food Co.*, 712 F.2d 122, 124 (5th Cir. 1983); *Wyman-Gordon Co.*, 613 F. Supp. at 632.

Where an arbitration award has been overturned on public policy considerations, the court has not questioned the factual findings of the arbitrator. Rather, the court has found that, assuming all of the facts found below are true, the enforcement of the award will violate a public policy. See, *e.g.*, *Keystone Consolidated*, 782 F.2d at 1403-1405 (refusal to apply waiver provision of ERISA in interpreting a pension agreement violated public policy behind enactment of ERISA); *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739, 742-743 (5th Cir. 1985) (employee who clearly was smoking marijuana won arbitration award because of arbitrator's notion of industrial due process; such an award violated public policy against drugs); *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822, 825-826 (1st Cir. 1984) (employee who clearly embezzled money won arbitration award because of employee's intent to return money; such an award violated public policy against dishonest postal workers); *Great Western Food Co.*, 712 F.2d at 124-125 (truck driver who clearly was intoxicated

on the job won arbitration award because of possible alternative cause of truck accident; such an award violated public policy against drunk driving); *Jones Dairy Farm*, 680 F.2d at 1144-1145 (work rule which forbade employees from reporting unsanitary conditions directly to government officials violated public policy). While these courts correctly refused to defer to the arbitrator's conceptions of public policy, they continued to respect his findings of fact. It is in this context that plaintiff's contention must be examined.

The concurrence argues that an arbitration award cannot be overturned on public policy grounds unless the contract as construed by the arbitrator violates some rule of positive law. More precisely, in the context of the review of an arbitration award which orders the reinstatement of an employee because there was no just cause to terminate that employee, the concurrence argues that so long as the reinstatement of that employee does not violate any rule of positive law, the award cannot be overturned on the ground of public policy. However, the courts have never construed the public policy exception so narrowly. An employer who employs someone who has used drugs does not violate any rule of positive law, yet the Fifth Circuit overturned an award which ordered the reinstatement of an employee who was smoking marijuana on company premises, because the award violated public policy. *Misco*, 768 F.2d at 742-743. An employer who employs a truck driver who admittedly drank while on duty does not violate any rule of positive law, yet the Fifth Circuit overturned an award which ordered the reinstatement of such an employee, because the award violated public policy. *Great Western Food Co.*, 712 F.2d at 124-125. If the Postal Service employs a convicted embezzler, this employment does not violate any rule of positive law, yet the First Circuit overturned an award which ordered the reinstatement of such an employee, because the award violated public policy. *American Postal Workers Union*, 736 F.2d at 825-826. In this last case, the union raised precisely the same argument that is proffered by

the concurrence today: Even if there is a public policy against embezzling Postal Service funds, there is no public policy against the Postal Service employing convicted embezzlers, and to overturn an award on public policy grounds "[y]ou have to have something more—a direct legal prohibition." *Id.* at 824. Yet the First Circuit explicitly rejected such a requirement. *Id.* See generally Gorman at 597 ("when the award, although not requiring illegal conduct, is said to be inconsistent with some significant public policy," the award may be overturned).

The view of the public policy exception urged by the concurrence also conflicts with this Court's prior case law. In *Jones Dairy Farm*, we held that an arbitration award upholding a work rule which forbade employees from reporting unsanitary conditions directly to the government officials violated public policy, and we refused to enforce the award. *Jones Dairy Farm*, 680 F.2d at 1144-1145. However, we never said that the work rule violated any rule of positive law, nor did the work rule violate any positive law. *Id. Jones Dairy Farm* is thus in complete harmony with the public policy exception as stated today.

Nevertheless, given the above legal standard regarding the public policy exception to the review of arbitration awards, plaintiff's contention that the arbitrator's award violates public policy must be rejected. As already noted, there are two components to the issue of workplace safety in this case. One component is the factual finding made by the arbitrator that the chance of recurrence of McClendon's violent acts is extremely remote. The second component is his judgment that this remote chance of harm to others does not mandate an award against McClendon. Assuming that workplace safety is a valid public policy, *cf. Super Tire Engineering Co. v. Teamsters Local Union No. 676*, 721 F.2d 121, 125 n.6 (3d Cir. 1983), certiorari denied, 105 S. Ct. 83, the public policy doctrine allows this Court to decide *de novo* whether the judgment made by the arbitrator (*i.e.*, the second component identified above) violates public policy. Given the remoteness of a recurrence of McClendon's breakdown, we decide that the

arbitrator's judgment was permissible. Plaintiff makes the additional argument that the factual finding that the chance of a recurrence is remote (*i.e.*, the first component identified above) is not supported by the record, and thus the policy of workplace safety is violated. This additional argument goes beyond the usual public policy argument, however, since it requires this Court to re-find facts found by the arbitrator, rather than accept the arbitrator's factual finding and decide whether the arbitrator's judgment based on that factual finding violated public policy. As already seen, courts applying the public policy doctrine have exercised only the latter function.

The appropriate standard of review for a factual finding such as this which pertains to a public policy exception has not yet been judicially established. On the one hand, plaintiff's attack on this factual finding can be viewed as an end-run around the normal extreme judicial deference to arbitral fact-finding. Under this view, a court would apply that same extremely deferential standard of review to this type of factual finding as with all arbitral factual findings. On the other hand, this kind of factual finding is different because it pertains to a public policy exception. An arbitral award is not to be enforced if it violates public policy, and this duty would be impaired if a court had to defer to clearly erroneous factual findings made by the arbitrator. Viewed in this light, a less deferential standard of review such as the "clearly erroneous" standard embodied in Fed. R. Civ. P. 52(a) might be more appropriate with respect to this type of factual finding.

We need not decide here the precise legal standard for reviewing a factual finding that pertains to a public policy exception since even under the less deferential clearly erroneous standard of review the arbitrator's factual finding that the likelihood of a future breakdown by McClendon is remote must be accepted.[2] This factual finding is sup-

[2] In discussing the record in connection with this factual finding, both parties make numerous references to the arbitration hear-

(Footnote continued on following page)

portable because although Dr. Polydefkis testified that a repeat occurrence of McClendon's breakdown is possible, Dr. Espindola testified that McClendon was not psychotic and was on the road to recovery (Tr. 151, 158). Additionally, McClendon had not experienced any incidents subsequent to the sole episode that led to his discharge.

For the above reasons, the judgment of the district court is reversed and the arbitration award will be enforced.

EASTERBROOK, *Circuit Judge*, concurring. "Public policy" is an ambiguous term. A court that sets aside an arbitrator's award could mean: "Whether or not the award carries out the contract, there is a rule against this outcome." An arbitrator's reinstatement of white employees in preference to identically-situated black employees would violate public policy in this sense. If the contract does not authorize this differential treatment, the award fails because inconsistent with the contract; if the contract does authorize the difference, the award fails because several statutes prohibit racial discrimination in employment. DuPont does not argue, however, that its collective bargaining agreement with the union violates public policy in this way. If the agreement stated that "Employees who go berserk as a result of a psychiatric episode that is unlikely to recur may remain with the firm", this clause would not violate any rule of law.

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[2] *continued*
ing transcript. This transcript was never entered into the record in the district court and is not part of the record on appeal. We admonish litigants to include in the record all relevant material which they cite to in their briefs. Since both parties refer to this transcript, we will take judicial notice of it pursuant to Fed. R. Evid. 201. See generally 10 MOORE'S FEDERAL PRACTICE § 201.60 (1976).

Public policy is pertinent to an arbitrator's award in a second way. "When an arbitrator bases his award on public policy considerations, he has overstepped his authority and the court may review the substantive merits of the award." *Local No. P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm*, 680 F.2d 1142, 1144 (7th Cir. 1982). The arbitrator's job is to enforce the parties' bargain. An arbitrator is not authorized to substitute his own view of wise policy for that of the parties. *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 183-85 (7th Cir. 1985). So if the contract had contained the hypothetical clause giving an employee one free rampage, and the arbitrator had said "This violates public policy because it may reduce the level of safety in the plant", a court would set the award aside and instruct the arbitrator to carry out rather than frustrate the parties' lawful bargain.

Public policy is used in still a third way when a court claims the right to do what the arbitrator may not, to decide whether an award cuts at cross purposes with a policy the court thinks valuable. If an arbitrator reinstates an employee caught using drugs, the court may say that this undermines the public policy of deterring the use of drugs, so the award cannot stand. *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739, 743 (5th Cir. 1985). In this case, in which the arbitrator reinstated an employee whose behavior threatened the safety of other people, the district court concluded that the interest in the safe operation of the plant is more important that the employee's interest in working at DuPont, and it set aside the award.

The court today approves this inquiry in principle, although it disagrees with the district judge's implementation of the principle. I find the principle itself objectionable. A power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping. A court lacks this power for the same reason the arbitrator does—the function of arbitrator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law. There is a graver difficulty with the

invocation of this loose use of "public policy" to set aside an award. It conflicts with a *real* public policy, one expressed in positive law. Section 9 of the Arbitration Act, 9 U.S.C. §9, states that a beneficiary of an arbitration award may apply to a court "for an order confirming the award, and thereupon the court *must grant such an order* unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title" (emphasis added). This statute abrogates any equitable power courts formerly enjoyed to decide which awards to enforce. The only provision in §10 or §11 authorizing review of this award is §10(d), which states that a court may vacate an award "[w]here the arbitrators exceeded their powers". This makes enforcement of the award turn on the meaning of the contract, not on equitable notions about public policy. If the contract violates a rule of law, then the contract itself may be set aside; this is the first use of public policy I discussed. But if the contract is lawful, and the arbitrator follows or interprets the contract within his authority, the court "must grant . . . an order" enforcing the award.

Appellate courts, including this one, have not kept these meanings of public policy separate. But the distinction flows from the nature of the arbitrator's job and the command of the Arbitration Act. This may be clearer if we return to the case of the explicit contractual term. Suppose DuPont's contract expressly excused a single psychotic tantrum, provided the problem was unlikely to recur, or suppose a contract excused a single episode of larceny from the employer. If the firm, honestly implementing its contract with the employees, reinstated the berserker or the thief (or never discharged him), no public policy would stand in the way. If the person's immediate supervisor fired him, and someone higher in the line of command reversed that decision as a result of a grievance, there would be no greater reason for review. A contract of arbitration transfers the power of this manager to the arbitrator. If the arbitrator carries out the contract, the decision should be treated the same as the management's

own. Firms may place decisionmaking authority where they please, and the Arbitration Act restricts the court to ascertaining that the arbitrator was a faithful agent of the contracting parties. This does not mean that public policy is irrelevant. If the contract violates a rule of law, it must be set aside. That is what happened in *Local P-1236*, on which the majority relies. The firm forbade its employee to report violations of safety rules to federal safety inspectors, the arbitrator enforced the rule, and the court held that the rule violated public policy. *Local P-1236* does not support the majority's broader proposition that a court may set aside an award even when the arbitrator accurately construes the contract and the contract, so construed, is lawful.

Of course most collective bargaining agreements are not as detailed as the one I have been discussing. They provide, as this one did, that employees may be discharged for "just cause." The arbitrator must define just cause. He may infer that "fault" is a component of just cause, as the arbitrator in this case did, so that the contract then becomes just like my hypothetical—an employee who loses control of his actions without moral culpability (fault) may not be fired, unless recurrence is likely. The court must decide under §10(d) of the Arbitration Act whether this is a permissible reading of the contract rather than a frolic of the arbitrator's. If the reading is within permissible bounds—quite expansive, as *Ethyl* demonstrates—the case is identical to the one in which the clause is explicit. The public policy inquiry should be the same whether the arbitrator is applying an express clause of the contract or applying a general one (such as "just cause") that he has made concrete.

Whether the arbitrator deals with a general or a specific clause also makes no difference to the second stage of the judicial inquiry, whether the arbitrator has found facts that bring the employee within the clause. Here the arbitrator found that there is but a remote chance that the psychotic condition will recur. The majority hints that "public policy" might allow this finding of fact to be

reviewed more liberally than other findings—such as, for example, a finding that the employee was not asleep on the job when the supervisor said he was. No other court has drawn this distinction, which would be both inconsistent with the Arbitration Act and also impossible to carry out when an arbitrator writes a brief opinion or none at all. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). True, an arbitrator's decision may get little or no weight when the public policy is a law. For example, an arbitrator's decision that a person was not the victim of racial discrimination will get only the weight its persuasive force deserves. *McDonald v. City of West Branch*, 466 U.S. 284 (1984); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n.21 (1974). This limitation on review comes from the rule that an arbitrator's decision, like the contract on which it was based, must conform to law. If the decision, right or wrong, would be a lawful one—if, by hypothesis, the employer may retain thieves as well as sluggards on its payroll—there is no occasion for more searching review of a decision that the employee has learned his lesson and will not steal again than there is of a decision that he was not asleep on the job.

Considerations of public policy may have a different, less direct, influence on the decision to deny enforcement to an award when the terms of the contract are unclear. Suppose the contract says only that employees may be fired for "just cause," and the employer fires someone for theft. It is exceptionally unlikely that any (sane) employer would agree to keep thieves on the payroll. Theft is hard to detect. A thief caught in the act may have stolen before and might do so again. A stiff punishment for theft is in order. If no rational firm would enter into a contract expressly excusing theft, then a court should conclude that an arbitrator who does this is indulging a personal quirk, has succumbed to the desire to give someone a "second chance" and has abandoned his role as honest interpreter of the contract. Similarly, if because of potential liability to its workers for having an unsafe working environment

no firm would adopt a clause giving a psychotic worker a second chance, an arbitrator who provides a second chance is expressing sympathy, administering home-brewed justice rather than the contract. Public policy may be a useful guide to the sorts of provisions that will not appear in contracts, and when no one will write the provisions expressly arbitrators may not infer them. If a court concludes, however, that the implication of a rule by the arbitrator is not a frolic, that a rational firm could have such a rule and apply it prospectively, then the only further role for public policy is to determine whether the rule violates positive law. A court may not engage in especially searching review of factual findings.

I therefore agree with Judge Stapleton "that the district court [is] bound to enforce the award unless it could be said that the *collective bargaining agreement*, as construed, [is] contrary to law or against public policy." *Local 863 International Brotherhood of Teamsters v. Jersey Coast Egg Producers, Inc.*, 773 F.2d 530, 536 (3d Cir. 1985) (concurring opinion) (emphasis added). This is also, I think, the view of the Supreme Court. The Court has never held that an arbitration award that complies with the contract and positive law may be set aside on the basis of vague beliefs about public policy. This is the Court's position:

> As with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy. [The arbitrator's] view of his own jurisdiction [in this case] precluded his consideration of this question, and, in any event, the question of public policy is ultimately one for resolution by the courts. If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."

W.R. Grace & Co. v. Local Union 759, International Union of Rubber Workers, 461 U.S. 757, 766 (1983) (citations omitted). This passage makes all my points. The question is whether the contract, as construed, violates positive law; "general considerations of supposed public interests" do not justify setting aside an award. Public policy in this loose sense is off limits to courts and arbitrators alike.

Ours is therefore an easy case. The arbitrator was entitled to interpret the contract as establishing a "fault" standard. It is not irrational for an employer to excuse a single bizarre episode if signs point to recuperation. DuPont does not argue that employing a person with a history of psychotic behavior violates any rule of law, such as the Occupational Safety and Health Act; for all we know, DuPont can give McClendon a job far away from acids and other dangerous substances. The record discloses enough, given the exceptionally deferential standard of review, to permit the arbitrator to find that McClendon is unlikely to have a relapse. I therefore concur in the judgment, although not in any suggestion that courts may patrol arbitral decisions for compliance with "general considerations of supposed public interests" as opposed to compliance with law.

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APPENDIX B

Filed March 6, 1986
Richard E. Timmons, Clerk
U.S. District Court
Northern District of Indiana.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

E. I. DuPONT DeNEMOURS AND COMPANY,
Plaintiff

V.

GRASSELLI EMPLOYEES INDEPENDENT ASSOCIATION OF EAST CHICAGO, INDIANA,
Defendants

CAUSE NO. H 79-493

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SEEKING VACATION OF AN ARBITRATOR'S AWARD AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SEEKING ENFORCEMENT OF THE ARBITRATOR'S AWARD

This matter is before the court upon plaintiff's motion for summary judgment seeking to set aside a labor arbitration award, and defendants' cross-motion for summary judgment of its counterclaim for enforcement of the arbitration award. The parties have agreed that the material facts are not in dispute. Therefore, a ruling on the opposing motions for summary judgment is appropriate.

The controversy submitted to arbitration involved the discharge of Willie McClendon by the plaintiff E. I. DuPont DeNemours & Company (DuPont) on December 29, 1977. McClendon was hired by DuPont's East Chicago Plant on May 23, 1974, after having worked at DuPont's Chicago Plant for eight months. On the morning of December 26, 1977, McClendon attacked Ralph Beiriger, a supervisor, and Ronald Fletcher, a bargaining unit employee, and destroyed company property. It appears from the record that the attack was unprovoked.[1]

Three days later, on December 29, 1977, McClendon was officially discharged for the assault on his fellow employees and for destruction of company property. After the attack, McClendon was taken to the police station and then to the psychiatric ward of a hospital where he remained for more than 30 days. McClendon was charged with a criminal offense, but was subsequently acquitted because he was diagnosed as being temporarily insane at the time of the incident.

Pursuant to Article X of the collective bargaining agreement the defendant, Grasselli Employees Independent Association of East Chicago, Inc. (Union), filed a grievance protesting McClendon's discharge. The grievance was denied at the third step by DuPont, at which time the parties submitted the dispute to arbitration as required by the Union contract. The parties then executed a "Submission Agreement" which authorized the arbitrator to decide the following issue:

> Did the company violate Article III, § 8 and/or Article XIII § 1 of the Collective Bargaining Agreement by discharging Willie McClendon on or about December 29, 1977? If so, what shall the remedy be, if any, under the terms of the parties' collective bargaining agreement?

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[1] The circumstances surrounding the attack are fully described in Arbitrator Howlett's opinion at pages 7-11.

The bargaining agreement provision at issue, Article III, § 8 is the "Security of Employment" provision which states that "no employee will be discharged except for just cause."

An arbitration hearing was held on March 20, 1979, at which evidence was introduced regarding the just cause issue, including possible reasons for McClendon's actions as well as mitigating factors which might explain his actions or lessen his culpability. The arbitrator heard testimony concerning the possibility of drug use by McClendon prior to the incident and family problems he was having at the time. The most probable explanation for McClendon's actions was found to be that he experienced a temporary "psychotic episode." Evidence that such an episode occurred was supported by the testimony of two psychiatrists. Based upon this evidence, the arbitrator concluded that McClendon's discharge must be set aside.

In a 43-page opinion, the arbitrator made the following findings to support his conclusion that McClendon's discharge was not for "just cause" as required by the collective bargaining agreement:

> (1) that grievant suffered a mental or emotional breakdown when he assaulted the two employees and damaged company property;
>
> (2) that due to this mental breakdown, grievant was not 'at fault' and further, that lack of fault is a proper element to be considered in determining 'just cause' for discharge, (citing arbitration decisions on pages 30, 32, and 33 of the opinion);
>
> (3) that the likelihood of grievant having a mental breakdown in the future is remote; and
>
> (4) that the testimony of various doctors shows that grievant did not misuse drugs.

From the above findings, the arbitrator determined that "just cause" was not established and that danger to company

property does not outweigh the failure to establish just cause for discharge. In further support of his determination, the arbitrator found that the company violated its own procedural policy because it discharged grievant before conducting a complete investigation and gave grievant no opportunity to present his side of the story as required by company guidelines. *See* document entitled "Supervisory Guidelines—No. D-30 Discipline."[2]

On October 19, 1979, DuPont filed the instant complaint to vacate the arbitrator's award. DuPont's position is threefold:

> (1) that the arbitrator's award does not 'draw its essence from the collective bargaining agreement' as the arbitrator based his decision on private notions of equity rather than a strict interpretation of the collective bargaining agreement;
>
> (2) that inter-employee violence is *per se* just cause and thus the arbitrator exceeded the scope of his authority by taking into account mitigating factors; and
>
> (3) that enforcement of the arbitration award would be against public policy and would require DuPont to violate Federal Occupational Safety and Health Administration (OSHA) standards, Indiana law, and the common law.

The Union, on the other hand, contends that a court's power to review an arbitrator's award is strictly limited to determining whether the award is based in some rational manner on an interpretation of the collective bargaining agreement. In the present case, the Union argues, the arbitrator confined his decision to the "just cause" provision, and properly found that

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[2] The arbitrator cited the decision of *Whirlpool Corp.* 58 Lab. Arb. 421 (Carroll R. Daugherty 1972) as authority for the proposition that failure to follow procedural guidelines is relevant to the determination of whether there was just cause for discharge.

because McClendon suffered a temporary mental breakdown, he was not at fault for his actions and therefore his dismissal was without just cause.

The law to be applied in reviewing the arbitrator's decision in this case is well established. The Supreme Court has held that an arbitrator's award under a collective bargaining agreement "is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80S. Ct. 1358, 1361 (1960). In explaining this standard, the Court stated:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

363 U.S. at 597. In a recent Seventh Circuit decision, *Miller Brewing Co. v. Brewery Wkrs. Local Union No. 9,* 739 F.2d 1159 (7th Cir. 1984), Judge Posner stated that

> [W]hat is meant is that the award is valid provided it is an attempt to interpret the collective bargaining agreement rather than to apply the arbitrator's own notions of right and wrong .... His interpretation may very well have been incorrect, but that is none of our business. Our function is complete when we are satisfied that the arbitrator was not dispensing quasi-justice but was construing the collective bargaining agreement.

Id. at 1162-63. *See also, Young Radiator Co. v. U.A.W. Local Union No. 37,* 734 F.2d 321, 324 (7th Cir. 1984); *Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l Union, Local 7-1,* 548 F.2d 1388, 1293-94 (7th Cir. 1977).

In accordance with the foregoing legal principles, the first issue we must decide is whether the arbitrator failed to confine himself to the terms of the collective bargaining agreement in arriving at his decision. DuPont contends that the arbitrator based his decision on the finding that McClendon was "temporarily insane" and therefore not at fault at the time of the attack. According to DuPont, this finding was improper because the collective bargaining agreement states only that an employee may be discharged for "just cause" and nowhere states that elements of fault or the employee's mental state should be substituted for the standard of "just cause".

Examination of the arbitrator's opinion makes it clear that the decision was based in part on the finding that McClendon was not at fault for his actions. For example, page 25 of the opinion, states:

> The Union, on the other hand, advances the principle that 'just cause' is established only when an employee is 'at fault' for his actions. In this instance, the Union avers —and the evidence establishes—*Grievant was not responsible for his December 26 acts;* and there is no likelihood that the incident will again occur.
>
> I have studied the evidence as recorded by a court reporter. I observed the witnesses, including the Grievant. I have reached the conclusion that, in this case, the discharge should be set aside.
>
> The evidence establishes that Grievant suffered a mental or emotional breakdown when he assaulted the two employees and damaged Company property. *The evidence does not persuade that Grievant was 'at fault'* to the extent that he abused or misused drugs which caused his behavior on the morning of December 26 as the Company asserts.
>
> The evidence persuades that the likelihood of Grievant having a mental breakdown in the future is remote. Danger to Company employees and property does not outweigh the failure to establish just cause for discharge. (Emphasis added).

Further examination of the opinion reveals that the arbitrator did not give sufficient consideration to the extent of the violence or the dangers to other employees created by McClendon's behavior. The decision only contains the conclusion: "Danger to company property and employees does not outweigh the failure to establish just cause for discharge."

The precise issue is whether the arbitrator erred in determining that just cause was not present after finding of lack of fault, and without considering the relevant factors.

Because most cases involving a "no discharge except for just cause" provision arise in the context of arbitration, there are only a few federal cases applying to provision to particular factual situations. In *Scott v. Riley Co.*, 645 F.2d 565, 568 n.4 (7th Cir. 1981), the Seventh Circuit quoted a general definition of just cause as written by then District Judge Aldrich in *Local 205 United Electric Radio Machine Workers Am. v. General Electric*, 172 F. Supp. 53 (D. Mass. 1954).

> Good cause . . . means what a reasonable person would find sufficient; the phrase creates an objective rather than a personal subjective test.

In the context of arbitration, the determination of whether just cause exists is clearly a matter which must be determined on a case by case basis, based upon the arbitrator's examination of the circumstances surrounding an employee's termination. However, where an arbitrator bases his decision upon one of many relevant factors without adequately considering the other relevant factors, it becomes apparent that he is attempting to enforce his own notions of equity.

In the present case, the court finds that the arbitrator failed to confine himself to interpreting the terms of the collective bargaining agreement when he premised his decision on the lack of fault on the part of McClendon without an equally corresponding consideration of the extent of the violence

involved and the employer's strong interests in maintaining a safe work place.

The narrow focus of the arbitrator's decision resulted in changing the governing test of the employer's good cause for that of the employee lack of fault. The arbitrator cannot do this. A review of recent decisions within this circuit show that the determination of just cause involves weighing the employee's strong interests in maintaining job safety, employee discipline, and employer morale against the employee's interest in not being arbitrarily discharged. *See Scott v. Riley,* 645 F.2d 565, 568 (7th Cir. 1981); *Young Radiator Co. v. Int'l Union, U.A.W.,* 734 F.2d 321 (7th Cir. 1984); *S.J. Groves & Sons Co. v. Int'l Brotherhood of Teamsters Local 627,* 581 F.2d 1241, 1245 (7th Cir. 1978); *Hardesty v. Essex Group, Inc.,* 550 F. Supp. 752, 769 (N.D. Ind. 1982). Each of these decisions held that a myriad of factors must be taken into account when making a just cause determination. Such factors include the nature of the employee's conduct, the extent to which fellow employees were endangered by that conduct, or whether provocation existed.

For instance, in *Hardesty v. Essex Group, Inc., supra,* an employee was discharged for carelessly throwing a lighter in conscious disregard for the safety of others which resulted in a fellow employee's hospitalization. Judge Sharp held that the employee's actions constituted "just and reasonable cause" for his discharge within the meaning of the parties' collective bargaining agreement. The court held that in making this determination, various employee interests must be examined, including the concern over job safety, employee discipline, and employee morale. In support of the court's conclusion, Judge Sharp cited the arbitral decision of *Hess Oil v. Virgin Islands Corp,* 72 LA 81, which ruled that an employer had just cause to discharge an employee for gross negligence where the employee panicked and failed to shut off a valve, thus causing an

explosion which resulted in considerable damage to the equipment. Arbitrator Berkman explained that:

> The grievant's failure to adhere to the simple safety procedures in this case resulted in extensive damage to the charge heater *and perhaps more important, potential harm to fellow employees* (emphasis added in district court opinion).

72 LA 83. Likewise, in *Groves, supra,* the court held that an employee's discharge was fully justified in light of the employee's legitimate concerns in job safety and in employee discipline and morale. In that case, a fight erupted after a heated verbal argument, and resulted in injury to an employee. From the foregoing it is clear that the employer's interest, most importantly the danger of harm to employees, must be weighed in making a just cause determination.

In the present case, the arbitrator failed to discuss these factors, the more important of which is the extreme violent conduct of the grievant, which resulted in injury to his fellow employees. Instead, the arbitrator based his just cause determination solely on the lack of fault of the grievant. Although the extent to which the employee was at fault may be of some relevance, the arbitrator's failure to balance this element against the other factors involved, especially the danger to other employees, shows that the decision does not "draw its essence from the collective bargaining agreement." Rather, it appears that the arbitrator was attempting to enforce his private notions of equity. In such circumstances, courts have no choice but to refuse enforcement of the award.

Supporting this decision are public policy concerns. An employer has a legal responsibility to maintain a safe work

environment. This duty arises by statute as well as by common law. For example, 29 U.S.C. § 654(a)(1) states:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Moreover,

> [E]mployees have an inherent obligation to protect their own safety and to cooperate in promoting safety.

Hardesty v. Essex Group, Inc., supra (citing Elkouri & Elkouri, *How Arbitration Works,* 3rd Ed. BNA, 1981 at 669.) In the instant case, the arbitrator specially found based on conflicting psychiatric testimony that the grievant was not likely to experience another psychotic episode. This finding does not justify the arbitrator's failure to expressly weigh the employer's legitimate concerns and legal duties regarding the maintenance of a safe work place.

The arbitrator further based his finding of lack of just cause on the fact that DuPont did not conduct a complete investigation of the incident before discharging McClendon. Defendant argues that this finding supports the arbitrator's decision. The court finds this argument unpersuasive. First, the alleged procedural irregularities are not relevant to the just cause issue submitted to arbitration, which mainly turns upon an examination of the employee's conduct. Second, grievant could not be prejudiced by the alleged procedural irregularities in view of grievant's uncontested extreme violent behavior, which clearly provided a rational basis for DuPont to believe it had just cause for discharge. In view of the above, these alleged procedural irregularities do not justify the arbitrator's finding of just cause.

IT IS THEREFORE ORDERED that the motion for vacation of arbitrator's award is GRANTED.

IT IS FURTHER ORDERED that defendant's motion to enforce the arbitrator's determination is OVERRULED and DENIED.

ENTER: March 5, 1985.

/s/ MICHAEL S. KANNE
Michael S. Kanne, Judge
United States District Court

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration
between

E.I. DuPONT DeNEMOURS AND COMPANY EAST CHICAGO PLANT

and

GRASSELLI EMPLOYEES INDEPENDENT ASSOCATION OF EAST CHICAGO, INC.

Case No. 51 30 0511 78
OPINION AND AWARD OF BOARD OF ARBITRATION
Robert G. Howlett, Chairman
Kenneth Tucker, appointed by Union
Owen Fairweather, appointed by Company

Appearances:

For the Employer:

Charles E. Mitchell, Attorney
Donald F. Lowe, Employee Relations Superintendent
Ralph Beiriger, Retired Supervisor
Ronald Paul Fletcher, Employee
Edward M. Phillips, Employee
Dr. Napoleon A. Martinez
Dr. Dimitri Polydefkis
Dr. Emilio Espindola

For the Union:

Barry Macey, Attorney
Larry Thrall, Director GEIA
Dean Stuckey, Director GEIA
Robert Tintari, Director GEIA
Maurice Govert, Director GEIA
Willie McClendon, Grievant

A grievance protesting the discharge of Willie McClendon on December 29, 1977 was submitted to arbitration pursuant to the Collective Bargaining Agreement dated January 5, 1973, between the East Chicago Plant and the Industrial Relations Department of E.I. DU PONT DE NEMOURS AND COMPANY (Company) and the GRASSELLI EMPLOYEES INDEPENDENT ASSOCIATION OF EAST CHICAGO, INC.

(Union). A hearing was held in Chicago, Illinois, at which both parties submitted oral and written evidence. A court reporter prepared a transcript of the hearing. Post-hearing briefs were filed by counsel for both parties.

Willie McClendon was first employed at the Company's East Chicago Plant on May 23, 1974 after having worked in a du Pont Plant in Chicago for a period of eight months. On the morning of December 26, 1977, Employee McClendon attacked Ralph Beiriger, a supervisor, and Ronald Fletcher, a bargaining unit employee; and destroyed Company property. The circumstances are described and discussed below.

On December 29, 1977, J.A. Smith, Employee Relations Supervisor-Personnel, sent a letter to McClendon which reads:

> "This letter is to inform you that as of December 29, 1977, you are discharged from employment with E.I. du Pont de Nemours & Company. The reasons for discharge are destruction of Company property and assaulting fellow employees. Your final pay check is enclosed.
>
> I remind you that your Company benefits are terminated as of December 31, 1977, except your hospital-surgical coverage which will terminate on January 31, 1978. I urge you to contact your local insurance carrier if you desire to obtain your own hospital-surgical coverage. Your Thrift Plan funds will be mailed to your as soon as they can be processed."

The Union filed a grievance protesting McClendon's discharge. The grievance was not offered in evidence. The grievance was answered at the third step by Assistant Plant Manager D. V. Luebke in a letter which reads:

> **"THIRD STEP - DISCHARGE**
> **WILLE McCLENDON**
>
> This grievance was presented on January 12, 1978 and related to discharge of McClendon for cause. I have investigated and considered the points discussed when

listening to the grievance and conclude there is no basis to change the Company position on discharge. The grievance is denied."

The parties executed a SUBMISSION AGREEMENT as required by the contract which reads:

"SUBMISSION AGREEMENT

The Union, Grasselli Employees Independent Association, and the Company, East Chicago Plant of E. I. du Pont de Nemours and Company, have agreed to submit the alleged contract violation concerning the discharge of Willie McClendon, to arbitration pursuant to their Collective Bargaining Agreement [d]ated January 5, 1973.

The parties hereby agree that the issue to be decided by the Board of Arbitration is as follows:

Did the Company violate Article III, Section 8 and/or Article XIII, Section 1 of the Collective Bargaining Agreement by discharging Willie McClendon on or about December 29, 1977? If so, what shall the remedy be, if any, under the terms of the parties' Collective Bargaining Agreement?

"The parties also agree that the Board of Arbitration shall render its decision in writing after the filing of briefs, and shall state in full its findings and the reasons therefor; and shall furnish a copy thereof to the Union and Company.

It is further agreed that the date and place of hearing shall be selected by the Board of Arbitration.

GRASSELLI EMPLOYEES
INDEPENDENT ASSOCIATION

By: /s/ KENNETH D. TUCKER
President

EAST CHICAGO PLANT,
E. I. DU PONT DE NEMOURS
AND CO.,

By: /s/ W. A. KOPPIN "

The contract provisions cited in the SUBMISSION AGREEMENT follow.

"ARTICLE III
SECURITY OF EMPLOYMENT

. . . .

Section 8. No employee will be discharged except for just cause. In the event an employee is discharged, the COMPANY will notify the UNION within twenty-four (24) hours. If it is subsequently determined that such discharge was unjust, the employee will be reinstated, his COMPANY and Plant Seniority shall be restored in accordance with Section 1 of this Article and he shall be granted pay in an amount "equal to wages which he reasonably would have been expected to earn during the time lost by reason of such discharge; provided, however, that any restoration of loss of earnings shall not exceed the amount the employee reasonably would have been expected to earn during the thirty-five (35) calendar day period from the date of discharge. Any protest of discharge of an employee and evidence pertaining thereto must be submitted in writing to Management within five (5) calendar days after the UNION is notified of the

discharge. Final decision shall be rendered within thirty (30) calendar days from the date such evidence is so submitted."

"ARTICLE XIII
INDUSTRIAL RELATIONS PLANS
AND PRACTICES

Section 1. All existing privileges heretofore enjoyed by the employees in accordance with the following Industrial Relations Plans and Practices of the COMPANY shall continue, subject to the provisions of such plans and to such rules, regulations, and interpretations as existed prior to the signing of this Agreement, and to such modifications thereof as may be hereafter adopted generally by the COMPANY to govern such privileges; provided, however, that as long as any one of these COMPANY plans and practices is in effect within the COMPANY, it shall not be withdrawn from the employees covered by this Agreement.

. . . .

Disability Wage Plan

. . . ." [Effective 9-1-76]

The Union also cites the arbitration provision of the contract which reads:

"ARTICLE XI
ARBITRATION

Section 1. Any question as to the interpretation of any provision of this Agreement or as to any alleged violation of the terms of this Agreement, which is not otherwise settled to the mutual satisfaction of the parties hereto shall, at the request of either party, be submitted to arbitration.

Section 2. A signed submission agreement shall be entered into setting forth the issue to be arbitrated, the place where the hearing shall be held and such other matters as the parties shall deem essential to a determination of the issue.

> Within ten (10) calendar days of the execution of the submission agreement, each party shall nominate its arbitrator and furnish him with a copy of the submission agreement. The two named arbitrators shall select a third, impartial arbitrator who shall act as chairman of the Board of Arbitration and be furnished with a copy of the submission agreement. If no agreement for a chairman is reached within seven (7) calendar days, a list or lists of arbitrators shall be requested by either arbitrator from the American Arbitration Association and upon receipt of same the named arbitrators shall select a chairman. The chairman shall then confer with the other two arbitrators to determine a time for the hearing.
>
> The decision of a majority of the three arbitrators shall be final and binding upon both parties hereto. The fees and expenses "of the third arbitrator shall be borne equally between the UNION and the COMPANY."

There is little dispute over the facts which preceded Grievant's discharge.

On December 23, 1977, Grievant was assigned to the third shift which commenced at 11:30 p.m. and terminated at 7:30 a.m.

He worked the shift on December 24/25, 1977. On Christmas Day he attended a family party and did not have any sleep before starting to work on the December 25/26 shift at 11:30 p.m. Grievant testified that during Christmas Day, he took Excedrin tablets for a headache, but no other medication and that he, at most, had one drink during the day.

Grievant married his wife, Dorothy McClendon "seven years" prior to the date of the hearing (March 20, 1979) and had four daughters and two sons.[1] Grievant's wife, "the children" and other family members were present at the party.

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[1] It is apparent from the testimony that some, or perhaps all, of the children were children of a previous marriage or marriages.

Grievant worked the December 25/26 shift until 7:30 a.m. At or near the end of the shift, he made arrangements with Supervisor Ralph Beiriger to drive him to the front gate. At about 8:00 a.m., Beiriger went to the Sulfamic Change House, where employees showered and changed their clothes, to pick Grievant up. Grievant was sitting naked on a bench with a pile of clothes beside him. Beiriger told him that he had some things to do and would return, which would give Grievant time to get ready. When Beiriger returned at about 8:30 a.m., Grievant was taking a shower. Beiriger "hollered" at Grievant, "Well, Willie, I can't wait. I'll have to come back for you again."

Beiriger returned about 9:00 a.m. Grievant was standing naked by his locker with a towel in his hand. Beiriger told him he had given him all the time he could, that he should hurry up, and that he would wait a few minutes while Grievant got dressed.

Beiriger testified to a conversation between himself and Grievant:

Beiriger: "Willie, have you been drinking?"

Grievant: "No."

Beiriger: "Well, have you taken anything?"

Grievant failed to answer.

Beiriger: "What did you take, Willie?"

Grievant did not answer.

Beiriger waited in a section of the building which is used as a lunchroom. While Beiriger was in the lunchroom, Grievant came in the door with a "scarf" in his hand. Beiriger testified the conversation continued:

> "I said 'I think we ought to go now.' He didn't have his clothes on. So I said, 'Yes, go ahead and get dressed and we'll go.'

> He said, 'No, I want to go right now.' I said, 'Well, you can't go like that.' I said, 'It's cold outside. You have got to get—' I said, 'That's why I'm here to give you a ride. Get your clothes on and we'll go.' "

At that point, Grievant threw the scarf over Beiriger's head, pulled it tight around his neck, swung Beiriger around so that his back was against Grievant and said, "Are we going to go now?" Beiriger replied, testifying that it would not be wise to antagonize Grievant, "Yes, okay, Willie." "Whatever you say, Willie."

Grievant jerked Beiriger toward the door, rammed him through the two sets of doors that lead to the outdoors, knocked him face down on the pavement, kicked him and twice said, "You should have retired." Beiriger tried to get up; Grievant kicked him again and said, "Willie, let me go", to which Grievant replied, "Shut up." Beiriger's two-way radio fell and started to "let out a squawking sound", which apparently startled Grievant. He stopped the attack and picked up the radio. Grievant returned to the locker room part of the Sulfamic Change House.

From the condition of the building after Grievant left, it was apparent that he did damage to the property of the sum of approximately $1,000.00.

Later, Grievant appeared, still naked, in the Sulfamic Department Building across a road from the Sulfamic Change House. He ran straight through the Control Room and out the west door of the building, vaulted a guard railing onto a network of pipes known as "Pipe Alley" that run along side the building and next to a sign which reads "Emergency Premix Slants—Do Not Touch." The ring is attached to a cable that is attached to a latch located on a premix tank. The equipment is used in case a safety procedure is necessary. Activating the cable could have caused material in the premix tank to run out into a trench leading to the sewer. There is a violent reaction

when the material—an acid solution of oleum and urea—comes into contact with cooling water in the sewer trench. It causes a heavy fume release. In addition, had Grievant activated the safety equipment, there would have been substantial financial loss to the Company.

In the meantime, the police had been called. When Grievant ran through the Control Room, a policeman and Ronald Fletcher, an operator, pursued Grievant. While Fletcher was attempting to get Grievant away from Pipe Alley, Grievant struck Fletcher with a steel pipe or rod twice. The second blow broke Fletcher's safety glasses, and caused a cut which required two stitches.

Fletcher testified that Grievant said he was going to die and that "I was going to go with him." Fletcher and another employee also testified that Grievant apologized for having said anything bad about anyone's family.

Grievant was finally subdued by Fletcher, another employee and the police officer, who handcuffed him. This procedure, Fletcher testified, took "probably close to twenty minutes, a half hour".

Grievant was then taken to the Police Station. The Police Report discloses that while Grievant was en route to the Police Station in the squad car, he kicked and spit at the officers. One officer attempted to restrain him; Grievant bit his right thumb sufficiently to break the skin.

The Police Report also discloses that while Grievant was in a cell, still handcuffed, he hit his head against the cell bars. He was then taken to the psychiatric ward of a hospital.

Grievant remained in the psychiatric ward for more than thirty days where he was treated primarily by Dr. Dimitri Polydefkis, a psychiatrist on the staff, who testified at the hearing.

The Company avers that Grievant was discharged in accordance with Company Rules which provide in relevant part:

"Grounds for Termination—Partial List

—Repeated or flagrant violations of safety rules.

. . . .

—Interference with job performance because of the use of alcohol, narcotics or illicit drugs.

—Fighting.

. . . .

—Immoral conduct.

. . . ."

There was testimony that the safety guidelines are routinely explained to new employees.

Grievant was charged with a criminal offense, but was acquitted because of temporary insanity.

Dr. Napoleon Martirez, the Company's plant physician, testified that on January 14, 1975 and February 8, 1977 Grievant was given customary regular physical examinations; the examinations revealed no evidence of any emotional or mental problem nor was Dr. Martirez aware of any such problem. Dr. Martirez saw McClendon at the hospital on December 26, 1977, but did not actively participate in treating Grievant. A drug screen was, Dr. Martirez testified, made at police request.

Dr. Dimitri Polydefkis supplied the primary treatment for Grievant while he was in the hospital. He testified:

> A few hours after Grievant was admitted to the hospital, he was frightened, distraught, disorganized and confused. Grievant's condition could have been caused by taking a toxic substance, or it could have been caused by a mental

or nervous breakdown without external injury. Grievant's "enzymes were quite out of order" and there was blood in his urine. Grievant improved and subsequent tests showed progress in his electrolytes and enzymes. Grievant became "more cooperative, more amenable to suggestion and cooperative out of his psychotic state." He saw Grievant almost every day and stayed with him "about three or four hours each time". He concluded that Grievant was "misusing drugs" and when he asked Grievant why he was doing this, Grievant said it was "intra-familial problems". That phrase means:

> "pressures and tensions in the family that were pushing him to do that. I believe he told me at one time he had to take the downers, so he could sleep, and he had to take the uppers so that he has enough pep to work.
>
> [H]e . . . had traumatic background. . . . was trying to find some stability in his life but . . . was experiencing excessive stresses within the family and he felt the need to counteract or handle those stresses by resorting to the inordinate use of drugs."

Excessive use of drugs "would account for his behaviour on December 26, 1977", although the incident could have occurred without being drug related.

The conclusions were dependent on information obtained from Grievant and his next of kin, but it was Grievant who told him about having resorted to drugs, about the intra-familial problems he was having which caused him to take the drugs and engage in the bizarre behavior on December 26.

He had no indication that Grievant was lying to him.

A urine test, taken at the hospital shortly after Grievant's admission, disclosed "positive" for barbiturates and "positive" for amphetamines. The Union brief notes the cautionary

language on the drug screening report, which reads with respect to both barbiturates and amphetamines:

"BARBITURATES:

.... Note: It is possible to get a false positive for this group with a high concentration of Glutethiamide.

AMPHETAMINES:

.... Note: It is possible to get a false positive for this group in the presence of Phenylpropanozamine and Ephedrine."

A urine screen taken on December 29 registered negative for barbiturates and amphetamines. Both Dr. Polydefkis and Dr. Emilio Espindola, who examined Grievant prior to his court case, testified that barbiturates and amphetamines stay in a person's system for some time.

Dr. Polydefkis testified the drugs remain in a person's system for "three, four days. This is a curve; it is not abrupt. It is a slant."

Dr. Espindola testified that "[i]f the amounts [of drugs] were substantial . . . there is a line of decreasing—decreasing line in which the levels . . . decrease in the blood. But it would still show up that there is [sic] some drugs in the blood." The questioning of Dr. Espindola continued:

Question: "Would a smaller amount of drugs . . . disappear from the testing results more quickly than a larger amount?"

Dr. Espindola: "There is no question that the less amounts will disappear perhaps a little bit faster than the greater amounts. However, you will still show some of these drugs in the blood."

Question: "As much as three days later?"

Dr. Espindola: "Yes."

Question: "So that if you saw a test three days after a first test that showed positive, the second test showed negative, what would your conclusions be with respect to the patient's use of drugs?"

Dr. Espindola: "Well, that either the patient was not on drugs and that it was a false positive, and then I will be able to weigh the condition of the patient, and also the reliability of the patient. . . ."

Question: "If Mr. McClendon had taken large amounts of barbiturates and amphetamines on the day of the 26th, the day of the first test, would those drugs have shown up on the December 29th test?"

Dr. Espindola: "Yes."

The Union notes that ephedrine is one of the substances which may produce a false positive for amphetamines; and that it is a substance used to treat allergies and is present in some cold/allergy tablets.

The court before which Grievant was charged appointed Dr. Polydefkis and Dr. Espindola to furnish psychiatric evaluations to McClendon. Dr. Polydefkis did not testify in court, as he had received short notice and was excused by the court. He did send a statement, however, which read:

"To Whom It May Concern:

This is to certify that I treated the above [Willie McClendon] at the St. Catherine's Hospital from 12/26/77 to 2/1/78 suffering from a severe mental disturbance. His condition is presently very much improved but continued treatment is necessary for him to maintain the improvement gained.

It is also my belief that the destructive behavior displayed prior to his hospitalization was the outcome of the above continued disturbance."

Dr. Espindola examined Grievant on March 9, 1978 for approximately two hours. He testified that Grievant had

suffered a period of temporary insanity, and added that Grievant was not psychotic on March 9, 1978.

Grievant testified:

He described his activities from the night of December 23 until 7:30 a.m. December 26 (as related above), and testified that he had no recollection of his attack on Supervisor Bieriger and Employee Fletcher.

During the night, a fellow operator gave him "two cold capsules" which the operator said he had gotten from a drugstore. As Grievant was cold, the operator gave him some thick insulated socks to put on.

He had been working "an awful lot of overtime between Thanksgiving and Christmas".[2]

He denied that he had ever taken any uppers or downers. He does not remember telling Dr. Polydefkis at the hospital that he had taken uppers and downers, but could not say that he did not tell him that.

Grievant was asked whether he made a call from the hospital on January 4, 1978 to Jim Smith, a Company official, to tell him what had happened. Grievant stated he did not recall making such a telephone call. The Company submitted in evidence a statement by Smith, which reads:

"Phone call—W. McClendon

—Called from St. Catherine's Hospital at 12:10 P.M. 1/4/78

—Wanted to explain what happened

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[2] In rebuttal, the Company disclosed that Grievant worked overtime, as follows: Week ending December 4—7.6 hours; week ending December 11—12.1 hours; week ending December 18—0 hours (on vacation three days); and week ending December 25— 9.9 hours. This can be, or it cannot be, "an awful lot of overtime", depending on an individual's viewpoint and physical condition.

—Worked 'lot' of overtime

—Had not slept much for several days

"—Had attended Xmas dinner at son-in-law's house

—Took *an* 'upper' to help him stay awake

—Was cold, *Nunn* gave him 'something' for his cold

—Went beserk [sic], doesn't remember what happened

—Feels Company should give consideration to fact he was not himself

—Only support for wife and children

—His doctor feels his job is important for 'recovery'.

—Turned phone over to Mrs. McClendon

—She doesn't know what family is going to do without Willie's support

—She is not well—this may be 'too much' for her

—Willie's doctor feels job is necessary for recovery

—Asked if I would talk to doctor—I declined."

The Company avers:

1. The unprovoked and severe attacks on Supervisor Bieriger and Employee Fletcher, together with the wanton destruction of Company property, constitute gross violations of well established plant rules, warranting and requiring discharge.

2. The use of drugs constitutes an intentional violation of plant rules justifying discharge where it results in the bizarre conduct and psychotic reaction manifested by Grievant.

3. Management has the responsibility to provide a safe working place and is subject to critical inspection and review by the Occupational Safety and Health Administration.

4. There are no mitigating circumstances or excuses, as Grievant was not overworked during the weeks prior to the incident (See Footnote 2).

5. The defense of temporary insanity is not available, as Dr. Polydefkis cautioned that Grievant's psychotic episode could take place with or without the use of drugs and it could reoccur. Given these circumstances and the intra-familial situation, the Company cannot be required to expose Grievant, innocent fellow employees and the plant processes to the perils and prospects of a further manifestation.

The Union avers:

1. The discharge should be set aside because:

a. Grievant was not responsible for his actions on the morning of December 26, 1977.

b. The Company violated its own rules on the discharge of employees by failing to give Grievant an opportunity to tell his side of the story and by failing to take into consideration the circumstances of Grievant's mental state.

In support of its position, the Union avers:

1. Arbitrators have reversed discharges of employees who exhibited bizarre and unusual behavior caused by mental problems.[3]

2. The criminal court found Grievant not guilty for reasons of insanity.

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[3] Cited by the Union are: *Consolidated Foods Corp.*, 58 LA 1285 (Harry Casselman, 1972); *Houdaille Industries, Inc.* 60 LA 1338 (David C. Altrock, 1973); *Foster Wheeler Corp,* 57 LA 1171 (John W. McConnell, 1971); *Brown & Williamson Tobacco Corp,* 60 LA 17 (John F. Sembower, 1972). The opinions support the principle for which the Union contends.

3. The strains and stresses connected with Grievant's family and the fatigue resulting therefrom are factors in causing mental or nervous strain and should be considered in determining whether discharge was for just cause.

4. The report of Dr. Espindola specified Grievant's desire to please those around him as one of his central problems.[4]

5. Grievant's apology to Fletcher and another employee for having said anything bad about anyone's family discloses the ambivalence Grievant felt toward his wife's family for whom he felt great affection, but also, perhaps, some resentment because of the responsibility he felt toward them.[5]

6. Grievant cracked under the strain to always please others and to always do the right thing. One occasion, three years and eight months after having worked for the Company and at forty-two years of age, is not just cause for discharge.

7. Grievant is not an incorrigible employee always in trouble, always pushing the employer to the limits. To the contrary, the record discloses he is a good employee, a hard working and conscientious man, who pushed himself beyond his own limits. A less conscientious man might have called in sick on December 26 when family obligations prevented sleep and a cold was developing.

8. The Company violated its own policy contained in a document dated April 30, 1975, entitled "SUPERVISORY GUIDELINES—NO. D-30, DISCIPLINE", which reads in relevant part:

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[4] Dr. Espindola's report stated Grievant's "thought content was expressed by worries about his job and the knowledge that he was trying to please everybody without realizing he was hurting his family and himself".

[5] Two employees testified to this statement.

> "6. *An investigation to determine all facts relative to the violation* should be started immediately by supervision. In determining the facts, supervision should conduct *open-minded* discussions of the violation with all employees believed to have information pertaining to the situation.
>
> 7. During the course of [the] investigation, the employee involved *must* be given an opportunity to present his side of the story. His Union representative may be present at the meeting if requested by the employee or supervision. In this discussion, supervision should state that *a sincere effort to determine all facts will be made before a decision is reached* on disposition of the case." [Emphasis is supplied in the Union brief.]

9. The Company did not follow the foregoing policy, but mechanically discharged Grievant for assault on a supervisor without any attempt to determine "all facts surrounding the incident".[6] Specifically, Grievant was not afforded "an opportunity to present his side of the story" before the decision to discharge him was made, as required by Company policy; and the Company did not make "a sincere effort to determine all facts . . . before a decision is reached on disposition of the case". When decision was to discharge Grievant, no psychological evaluation had been made; hence it was impossible to know what Grievant's mental state was and whether he had acted consciously or not. There was no necessity for the Company to act so precipitously, as Grievant was hospitalized for a period which the Company could have used to gather all medical evidence before making its decision.

10. The Company's approach to this case was predicated on the assumption that Grievant's mental state was

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[6] The Union brief notes that the police investigation report dated December 28, two days after the incident, discloses that the Company was "preparing the papers on [Grievant] so that he will be terminated from the Company".

irrelevant. Grievant was treated the same as an employee who consciously and purposely assaulted a supervisor. Because the Company failed to afford Grievant the consideration of its own professed discipline policy, the discharge should be overturned.

11. The argument that Grievant's actions were induced by drugs is an ex post facto rationalization of the Company's shortsighted decision.

12. That Grievant used drugs is not supported by the evidence:

a. The notice of discharge contains no reference to the use of drugs.

b. The Company made no attempt to investigate Grievant's condition before it decided to terminate him; it was undoubtedly aware of the December 26 urine screen when it made its decision.

c. The evidence does not support the conclusion that the use of drugs induced the incident; both psychiatrists agreed that the "psychotic episode" could have occurred without the presence of drugs.

d. The urine screen report reflects a caveat that false positive showings are possible.

e. The urine screen taken December 29 registered negative for both amphetamines and barbiturates; and both psychiatrists testified that drugs of this nature remain in the system for at least three or four days.

f. Grievant denied that he had knowingly taken either amphetamines or barbiturates, although he did testify he took two cold tablets provided by a fellow employee, tablets which could have contained chemical substances that produced false positive showings

in the uring screen. The tablets could have contained amounts of amphetamine and phenobarbital large enough to register on December 26, but small enough to have cleared the system by December 29.

13. Dr. Polydefkis was patently confused about Grievant's condition, as he testified that his conclusion was based in part on his belief that Grievant experienced "outbursts" and "disorderly behavior" before December 26 when, in fact, the unanimous testimony of all witnesses is that Grievant had shown no signs of any problem before that date.

14. Grievant's work record was exemplary at du Pont; and (the evidence disclosed) he did not miss a day of work from April, 1978, when he secured another job, to the date of the hearing on March 20, 1979.

The Union avers that the remedy should include:

1. Full disability pay under the du Pont plan for the period of time Grievant was disabled.

2. Reinstatement.

3. Full back pay, less interim earnings for the period that Grievant was able to work.

4. Reinstatement of full seniority and all other benefits.

The Union avers that the 35-day limit on back pay included in Section 8 of Article III is not binding on the Board of Arbitration, as the language is applicable only to situations where the Company and Union resolve discharges by mutual agreement. The authority of the Board of Arbitration arises, the Union avers, from Article XI, not Article III; and Article XI contains no limitation on the number of days of back pay allowable.

This case involves two well established arbitral principles found in discharge cases.

The Company contends that even though Grievant may not have been responsible for his actions on the morning of December 26, 1977, discharge should be sustained because employer and employees are entitled to a safe work place. Neither the Company nor its employees, the Company asserts, are required to risk the chance of another incident such as occurred on December 26.

The Union, on the other hand, advances the principle that "just cause" is established only when an employee is "at fault" for his actions. In this instance, the Union avers—and the evidence establishes—Grievant was not responsible for his December 26 acts; and there is no likelihood that the incident will again occur.

I have studied the evidence as recorded by a court reporter. I observed the witnesses, including the Grievant. I have reached the conclusion that, in this case, the discharge should be set aside.

The evidence establishes that Grievant suffered a mental or emotional breakdown when he assaulted the two employees and damaged Company property. The evidence does not persuade that Grievant was "at fault" to the extent that he abused or misused drugs which caused his behavior on the morning of December 26 as the Company asserts.

The evidence persuades that the likelihood of Grievant having a mental breakdown in the future is remote. Danger to Company employees and property does not outweigh the failure to establish just cause for discharge.

Another factor supports Grievant's cause. The Company violated its own policy when it discharged Grievant before a complete investigation. The evidence establishes that the Company breached the document entitled "SUPERVISORY GUIDELINES—NO. D-30 DISCIPLINE".

Grievant was in the hospital when the discharge letter of December 29, 1977 was sent to him. The evidence leads to the conclusion that the investigation was not "open minded" as the guidelines require. Grievant was given no opportunity to present his side of the story. The guidelines state that this *must* be done.

Company officials knew at the time of the discharge that Grievant was in the psychiatric ward at a hospital. He was entitled to a delay sufficient to make possible "an opportunity to present his side of the story".

The criteria for determining whether a discharge has been for just cause has been discussed in some detail in *Whirlpool Corp.*, 58 LA 421 (Carroll R. Daugherty, 1972).[7]

Arbitrator Daugherty's comments are relevant here as bearing on an employer's responsibility before imposing discipline or discharge, a responsibility which the Company failed to exercise. Arbitrator Daugherty compared an arbitrator's role to that of a review judge on appeal:

> "It should be understood that, under the statement of issue as to whether an employer had just cause for

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[7] See also *Lear Siegler, Inc.*, 63 LA 1157 (James C. McBrearty, 1974) and *Hydro-Conduit Corp.*, 70 LA 458 (James C. McBrearty, 1978) which discuss the same criteria. In the *Hydro* case, the arbitrator considered the fact that the offense for which an employee was disciplined had not been established as having occurred before the employer took disciplinary action. In his opinion, he said:

> ". . . .
>
> The charge of insubordination was certainly not 'proven' *before* the Employer took disciplinary action. In this sense then the degree of discipline was not reasonably related to Grievant's 'proven' offense. If the offense had indeed been 'proven,' then the degree of discipline could have been considered 'light'.
>
> . . . ."

discipline in a case of this sort before an arbitrator, it is the employer and not the disciplined employee who is 'on trial' before the arbitrator. The arbitrator's hearing is an appeals proceeding designed to learn ... whether the employer, as a sort of trial court, had conducted, before making his decision, a full and fair inquiry into the employee's alleged 'crime'; whether from the inquiry said trial court had obtained substantial evidence of the employee's guilt; whether the employer, in reaching his verdict and in deciding on the degree of discipline to be imposed, had acted in an even-handed, non-discriminatory manner; and whether the degree of discipline imposed by the employer was reasonable [sic] related to the seriousness of the proven offense and to the employee's previous record. In short, an arbitrator 'tries' the employer to discover whether the latter's own 'trial' and treatment of the employee was proper. The arbitrator rarely has the means for conducting, at a time long after the alleged offense was committed, a brand new trial of the employee.

It should be clearly understood also that the criteria set forth below are to be applied to the employer's conduct in making his disciplinary decision *before* same has been processed through the grievance procedure to arbitration. ...

"....

The Company's investigation must normally be made *before* its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense the company is obligated to conduct itself like a trial court.

There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is

found innocent after the investigation, he will be restored to his job with full pay for time lost.

. . . .

The company's investigation should include an inquiry into possible justification for the employee's alleged rule violation.

At his hearing the management 'judge' should actively search out witnesses and evidence, not just passively take what participants or 'volunteer' witnesses tell him.

5. At the investigation did the company 'judge' obtain substantial and compelling evidence or proof that the employee was guilty as charged?

It is not requred [sic] that the evidence be fully conclusive or 'beyond all reasonable doubt.' But the evidence must be truly weighty and substantial and not flimsy or superficial.

. . . ." [Emphasis in Text]

The investigation conducted prior to the December 29 discharge did not comply with the principles so well enunciated by Arbitrator Daugherty.[8] And, as the Association says in its brief, "[t]here was no necessity for the Company to act so precipitously."

The following factors are established by the evidence:

1. The Company did not conduct a full and fair inquiry into the December 26 incident.

2. The Company did not make a complete investigation before Grievant was discharged on December 29.

3. The Company did not, as it should have, suspend Grievant pending a thorough investigation.

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[8] See also *Kellogg Co.*, 28 LA 303, 308 (Bernard Meltzer, 1957).

4. The Company did not inquire as to whether there was possible justification for Grievant's behavior.

The Company cites *E I du Pont de Nemours & Co.,* FMCS Case No. 78K14969 (Albert Epstein, 1979), in which a discharge of a female worker was upheld. The Company notes that in that case the arbitration panel took into account the hazardous nature of the work at the de Pont plant which, coupled with Grievant's violent display of emotion, warranted the arbitrator in upholding the discharge. In that case, however, the employee, after having been told to remain in an office while her complaint against a fellow employee was investigated, left the office and *consciously* placed herself in a position to have another altercation with the employee against whom she had complained.

During the meeting of the Board of Arbitration, the Board member appointed by the Company expressed concern that, under the principle the chairman has applied here, any employee who acted in anger would be excused for his act because, at the moment, he was "temporarily insane".

The chariman would not apply such a doctrine in a "fight" or physical encounter case. Here Grievant suffered a mental or emotional breakdown to the extent that he did not know what he was doing. That fact renders the principle of lack of fault a proper element to be considered in this case.

A study of discharge or discipline opinions discloses that the concept of "fault" is inherent in such cases, although few arbitrators have directly discussed "just cause" vis a vis "fault". I cite examples:

In *United States Army Missile Command,* 73-2 ARB ¶ 8355 (Jay W. Murphy, 1973), an employee received a verbal reprimand for a threat he made to another employee. The

threat was in response to an apparently hostile advance from the employee. In his opinion, the arbitrator said:

> ". . . .
>
> It seems to this arbitrator that for the written reprimand to go on [grievant's] record would not be for 'just cause' in this situation. I think that [grievant] overreacted in comparison with what most employees would have done in the situation he faced, but that this overreaction is cause for counseling and not for reprimanding which is such a serious blemish on one's otherwise excellent work record. Viewed through his eyes I have no doubt but that he was reasonable and in good faith in his reaction, and, indeed, very very frightened else I simply cannot imagine (after observing [grievant] in his speech and demeanor) him offering to fight a fellow employee unless he felt beleaguered and quite beside himself. . . ."

Aribtrator Murphy found there was no "fault" because the Grievant reacted to the other employee's act. He did not *consciously* threaten the employee. There appears not to have been a "danger to other employees" involved in this case.

The arbitrator also considered post-incident evidence:

> ". . . .
>
> The fact that the grievant . . . has gone through the harrowing experience since July of having his conduct examined so carefully and critically up and down the line of authority is ample advice to [grievant] to seek to control any tendency he might have to overreact to situations of personal confrontations of disputes."

In this case, the evidence discloses that Grievant has another job; and performed responsibly on such job up to the date of the hearing.

The employer in *Orlando Transit Co.,* 60 LA 460 (James C. Vadakin, 1973) suspended bus drivers because its insurance carrier threatened to cancel the insurance if they were not suspended. The carrier contended they had a history of

unsatisfactory driving, based on computerized reports supplied by the State of Florida. Insurance could have been secured at higher costs. The contract provided that management retained the right to "discipline, suspend, discharge for cause".

The arbitrator held that the employees could not be suspended because of the carrier's opinion on their driving. There was no "fault". The concept of "fault" and "just cause" was expressed by the arbitrator:

> ". . . .
>
> Seemingly, then, a driver is condemned to the loss of his employment by a functionary of an insurance carrier, based simply on written reports, with the burden of proving his innocence on the driver, but with no opportunity for him to state his version of the incident(s) involved to the carrier. Such treatment is not cast in the mold of 'just' or 'proper' cause as required by the Agreement.
>
> . . . ." [p. 463]

In *Overhead Door Co.*, 70 LA 1299 (Jonathan Dworkin, 1978), an employee received a disciplinary suspension for absenteeism. The aribtrator found that the last incident was an excusable absence:

> ". . . .
>
> In effect, the Arbitrator finds that Grievant's absence of October 3 was not such as would justify discipline and that the grievance must, therefore, be sustained.
>
> . . . ."

As there was no "fault" in the last incident, the discipline was set aside.

As noted above, the discharge is also reversible as having been imposed without consideration of the available evidence. Grievant was not afforded due process prior to his discharge.

"Due process" rules might be inapplicable if the evidence established that the Company has a reasonable basis to believe

that a similar incident may occur in the future. However, this conclusion could not have been made on December 29. There is nothing in the evidence to disclose that the Company made any inquiry prior to the arbitration hearing as to the possibility of a reoccurrence of Grievant's condition.

And the evidence leads to the conclusion that the likelihood of a reoccurrence is remote.

As noted above, testimony received at the hearing, without objection, discloses that Grievant secured a job following his release from the hospital and that, as of the date of the hearing, he was successfully carrying out the responsibilities of that position.

The Company avers that Dr. Polydefkis cautioned that Grievant's psychotic episode could reoccur. Dr. Polydefkis' statement concerning reoccurrence was brought out on re-cross examination, in which he offered (without being asked) "I am not saying that this cannot reoccur. Nobody asked me if it can't or it can." He further testified that he recommended to Grievant and his family that he should "continue on treatment for alleviating those stresses", but he had not heard whether the treatments had been continued. Neither Company nor Union counsel explored this issue, *i.e.*, whether Grievant had continued to take treatment. However, as noted above, Grievant successfully performed responsibilities of his new job for a number of months with no evidence of any problem.

This brings us to the evidence on his alleged use and misuse of drugs. The Company presented evidence in an attempt to establish its contention that Grievant had been taking and abusing "drugs". These were not "illegal" drugs, but amphetamines and barbiturates which, in some forms, may be secured without prescriptions.[9]

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[9] During the hearing, there was a comment on a "black market" in such drugs, but no evidence was offered to establish that there is a "black market" or that Grievant had acquired any drugs on any "black market".

The Association describes the evidence as "ex post rationalization of [the Company's] shortsighted decision".

If Company officials considered that "drugs" were a reason for Grievant's behavior, such knowledge was not a basis for Grievant's discharge. He was discharged solely for his assault on two employees and his destruction of property.

Grievant testified that he had not, prior to December 26, taken any barbiturates or amphetamines.

Dr. Polydefkis testified concerning his opinion on the use or effect of drugs on the December 26 occurrence. There are inconsistencies in Dr. Polydefkis' testimony. The Chairman is not persuaded from his testimony that Grievant misused drugs as the Company asserts.

Dr. Polydefkis testified to the following:

1. He based his opinion on the incidents of drugs upon (a) the original drug screen and (b) statements made by Grievant.

2. "*I believe* he [Grievant] told me at one time he had to take downers so he could sleep, and he had to take the uppers so he has enough pep to work." [Emphasis supplied]

3. Grievant's condition *could* have been caused by taking a toxic substance or *could* have been caused by a mental or nervous breakdown without external injury.

4. Excessive use of drugs "would account for his behavior on December 26, although the incident *could* have occurred without being drug-related. He would not say that Grievant had been "abusing" drugs; he was "misusing the drugs". [Emphasis supplied]

5. The drugs he believed Grievant had been taking were not narcotics. A minor quantity of drugs would show up in the urine screen test.

6. If a person has been misusing drugs, it is generally manifested in work-related problems such as absenteeism, tardiness and poor work performance.[10]

7. He believed that Grievant had had periodic outbursts of disorderly behavior before the December 26 incident, information which he received from a Company supervisor.[11]

8. Nothing Grievant told Dr. Polydefkis gave him any evidence that Grievant was a habitual user of drugs.

9. Small doses of drugs could not "have created the kind of bizzare, unusual behavior manifested by [Grievant] ... one can get this bizarre behavior without any drugs".

Arbitration Board Member Tucker questioned Dr. Polydefkis. He recalled his conversation with Dr. Polydefkis.

The record discloses:

Mr. Tucker reminded the doctor that his conversation with the Doctor occurred within the first week after the incident.

Mr. Tucker:	"I think the specific question [I] asked you on the telephone was ... Mr. McClendon being treated for drug abuse."
Dr. Polydefkis:	"For everything, yes. What did I say?"
Mr. Tucker:	"You said no."
Dr. Polydefkis:	"Okay."

Mr. Tucker then told Dr. Polydefkis that his next question was how long Grievant had been in his mental state or in the problem he had been having. Dr. Polydefkis did not recall what he had replied to such a question, specifically

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[10] The record discloses that Grievant was a good worker with an exemplary record as an employee.

[11] No evidence was offered to establish that Grievant had ever had a prior incident such as occurred on December 26.

saying that he did not recall saying anything with respect to Thanksgiving of 1978.

Dr. Polydefkis' statement to the court where Grievant was tried made no mention of the use of drugs. It seems likely that had drugs been a significant factor in Dr. Polydefkis' opinion as a cause of Grievant's behavior, he would have said so in his written statement.

He also said that he did *not* testify that Grievant's episode was "a case of over dependence on drugs". He further said that Grievant's taking drugs "was a habitual thing". The real problem was the stress.

Dr. Polydefkis' testimony does not establish that Grievant had been abusing, misusing, or even taking, barbiturates and amphetamines.

That Dr. Polydefkis was not unduly concerned over the use of "drugs" vis-a-vis Grievant's job is established by his expression of surprise at the Company having discharged Grievant while he was in the hospital.

He testified:

> "I did express amazement for the fact that Mr. McClendon was being terminated while he was in the hospital. I don't know to whom. I believe it was Mr. Tucker. I did say that this is unheard of, and a—and I indicated my displeasure to that, but I also indicated my impotence in being able to do anything about that. This was contrary to my experience with other companies."

Dr. Polydefkis and Dr. Emilio Espindola, who examined Grievant prior to his court hearing, testified that drugs remain in a person's system for a few days. Dr. Polydefkis said, "three, four days"; Dr. Espondola said that drugs could show in the blood "as much as three days later".

The urine screen of December 29 registered negative for both amphetimines and barbiturates.

It appears, therefore, that Grievant could not have been "abusing" drugs.

It is possible that the two "cold tablets" which were furnished to Grievant by a fellow employee may have included a type of drug which, when coupled with Grievant's lack of sleep, caused an "upper" and "downer" reaction; hence, could have been a factor—perhaps *the* factor—in Grievant's December 26 behavior.

Glutethiamide, one of the drugs mentioned in the drug screen report as possibly giving a false positive, is defined as a:

> "[H]ypnotic sedative which produces alterations in the electroencephalographic pattern similar to those observed after administration of ... barbiturates ... [u]seful for induction of sleep with patients with simple and nervous insomnia ... [u]sed for patients who cannot tolerate barbituric acid derivatives".[12]

Phenylpropanozamine has a use:

> "Similar to ephedrine in hay fever, bronchial asthma, obesity, and locally to shrink mucous membranes".[13]

Its action is more prolonged than ephedrine.

Ephedrine is defined as:

> "A ... cortical and respiratory stimulant occasionally useful in treating morphine and barbiturate overdosage and similar types of drug poisoning."

It is also used to bolster blood pressure in shock cases. It:

> "counteracts the irrepressible desire to sleep, relieves the inversion of the sleep cycle, and abolishes the catalopic seizures."[14]

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[12] Remington Pharmaceutical Sciences (Mack Publishing Co. 1965)

[13] *Id.*

[14] *Id.*

Excedrin contains Acetaminophen, Salicylamide, Aspirin, and Caffeine. None of these ingredients are mentioned in the drug screen report.

The written statement of Employee Relations Supervisor Jim Smith was offered during rebuttal. The Chairman admitted the statement over Union counsel's objection. The statement records that on January 4, 1978 Grievant told Smith during a telephone call from the hospital that he took an "upper" to help him stay awake. Smith was not called by the Company to testify; hence could not be cross-examined as to whether there was further explanation of the meaning of "upper".

Grievant testified that at the Christmas party he took an Excedrin tablet, although it seems unlikely that one Excedrin tablet taken on Christmas Day could have caused Grievant's behavior. He performed all his work on his December 25/26 shift.

It is possible that the "cold tablet" included ephedrine or other substance which could have caused the false positive. Unfortunately, neither Company nor Union called the employee who gave the cold tablets to Grievant as a witness.

The Chairman is not persuaded that Grievant misused drugs.

I also take note of the Union argument that all testimony concerning drugs was based on information secured by the Company *after* Grievant was discharged, hence may not be used as evidence of the use of drugs in determining "just cause". This, because the Company breached its own rules in the investigation. There is merit in the Union objection.

The Chairman has weighed the "possible danger to other employees" argument against "just cause", which includes "fault". The Chairman reaches the conclusion that the discharge must be set aside.

We then reach the question of the remedy.

The Company contends that Section 8 of Article III prevents the Board from awarding back pay for more than 35 calendar days from the date of the discharge. The Union contends that such provision is not binding on the Board of Arbitration, because there is no mention in Article XI of any limitation on the Board's power to award back pay.

The Chairman reaches the conclusion that the power of the Board of Arbitration is no greater than the power of the Company and Union to resolve a grievance prior to arbitration. The parties have placed in the contract a limitation of a "[t]hirty-five (35) calendar day period from the date of discharge". The Board cannot go beyond this limitation.

It is apparent from the evidence that Grievant could not have worked during the 35 days after discharge; hence, he is not entitled to back pay.[15]

There is, however, no limitation on the Board's power to require that other benefits, including the disability wage plan, be applied to an employee who has been discharged without just cause. Grievant is entitled to payments under the disability wage plan and such other benefits specified in Article XIII as are applicable. The Board will retain jurisdiction to determine any such rights which are not determined by the Company and Union.

AWARD

1. The discharge of Willie McClendon on December 29, 1977 is reversed.

2. E. I. Du Pont de Nemours and Company is directed to return Grievant to his position, in accordance with his seniority,

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[15] It also appears from the testimony that Grievant secured a job within a relatively short period after leaving the hospital. The Chairman hopes that he has not suffered much financial loss.

on the beginning of the payroll period following receipt of this opinion and award.

3. Grievant is not entitled to compensation for lost wages for the period from December 29, 1977 to the beginning of the payroll period following receipt of this opinion and award.

4. Grievant is entitled to payment under the Company Disability Wage Plan; and is also entitled to such other fringe benefits and programs which may be applicable. E.I. Du Pont de Nemours and Company is directed to provide such benefits to Willie McClendon.

5. The Board of Arbitration retains jurisdiction to determine the benefits under Item 4 of this award to which Willie McClendon is entitled, and the amount or application thereof, in the event E.I. Du Pont de Nemours and Company and Grasselli Employees Independent Association of East Chicago, Inc. are unable to make such determination.

/s/ ROBERT G. HOWLETT
Robert G. Howlett,
Chairman Board of Arbitration

/s/ KENNETH TUCKER
Kenneth Tucker,
dissenting on Item 3 of the award

/s/ OWEN FAIRWEATHER
Owen Fairweather,
dissenting on Items 1, 2 and 4 of the award

Issued at
Grand Rapids, Michigan
September , 1979

AAA CASE NO. 51 30 1511 78
E.I. du Pont de Nemours,
East Chicago Plant
and Grasselli Employees
Independent Association
of East Chicago, Inc.—
Discharge of W. McClendon

DISSENT
by
OWEN FAIRWEATHER

The discharge of the Grievant was based on these facts: "On the morning of December 26, 1977, employee McClendon attacked Ralph Beiriger, a supervisor, and Ronald Fletcher, a bargaining unit employee, and destroyed company property" (Award p. 2). These attacks involved knock-downs, kicking, steel pipe beatings, broken safety glasses, stitches of cuts, etc.

The discharge was *not* because Grievant did or did not take amphetamine pills to stimulate him to keep him awake because of fatigue because he participated in an all day Christmas Party causing him not to have any sleep between his two working periods complicated by his use of barbiturate pills to relieve him from intra-family tensions to enable him to go to sleep. The Chairman wrote a 43 page award to rebut the statement by the attending doctor (pp. 13-14) and the report by Manager Smith that the Grievant had admitted that he had been engaged in the use of drugs leading to a conclusion that drug use and mixtures were basic to the Grievant's extreme behavior on December 26, 1977. The Chairman also attempted to rebut the findings in a drug screen test taken at the request of the police when he was delivered to the mental hospital.

To extend his conclusion the Chairman held that the attacks on Beiriger and Fletcher and property destruction were excusable because amphetamines and barbiturates are not

illegal drugs (p. 34). This suggests that violence emanating from a mixture of these so-called legal drugs excuses his actions. One need only to read Volume 40—Gordy & Gray, *Attorneys' Textbook on Medicine Amphetamines* (pp. 34-42) and Barbiturates (pp. 81-86), to learn that these drugs can cause a violent performance. The Chairman even agreed with the Union that all testimony about drug use collected by the management after the date of the discharge should be ignored. The drug use was not basic to the discharge. Again, a mere reading of the discharge reasons (p. 2) shows that the facts basic to the discharge were known when the discharge occurred. Hence, any investigation about drug use after the discharge was merely adding information but not facts needed to support the discharge decision.

The Chairman also excuses the violent conduct on the conclusion that small doses of drugs could not "have created the kind of bizarre unusual behavior manifested by Grievant." A management group would be much more secure if an employee who *had* been involved in an overuse of drugs was reinstated after it was determined that he had cured his habits. If the Grievant simply had a mental breakdown without any reason, except possibly fatigue, the risk of a repetition would be greater. If the "temporary insanity" event by which the Chairman excuses the conduct was simply a mental breakdown due to fatigue without the injection of drugs, the Grievant would be so sensitive to other breakdowns that he should not be at work in a chemical plant.

A very well-known arbitrator, Albert Epstein, in an Award in another duPont discharge, *Neoprene Craftsmen Union* case No. 52-30-0048-77, concluded that lack of sleep because he had been visiting his fiancee after a two-week separation does not excuse an employee discharged because he went to sleep at a time when he was assigned to act as the watchman. If a discharge is sustained when an employee merely goes to sleep on duty because he had no sleep during the prior non-working

period, the Grievant in this case should not be excused because he had a mental breakdown because he had no sleep during the prior non-working period. A big chemical plant must be operated with great precision so that the employees are completely protected from the negligence of fellow employees and the employees who are guilty of negligence should not be included in the group.

Proof of temporary insanity does not excuse violence in the Criminal Law (22 CJS, §§ 65, 66, 70) and a temporary insanity situation should not permit arbitrators to approve violence. Furthermore, the Grievant could well have pulled a cable when he was vaulting over a guard rail causing oleum, urea and water to be mixed (p. 10) resulting in a violent chemical reaction which could injure not only the Grievant but other fellow employees.

Under the new OSHA rules, the executives of a company are personally responsible, including jail sentences, if the employees are not properly protected from their own negligence and the negligence of fellow employees. *New York v. Warner Lambert Company,* No. 915/77 (BNA, OS&H Rep., p. 165). In this decision it was stated that "where workers' safety is concerned" it is not enough to leave the final word up to civil courts and administrative tribunals.

APPENDIX D

Rule 28.1 Listing of Subsidiaries and Affiliates of Du Pont

SUBSIDIARIES (excluding wholly owned subsidiaries)

BT&D Technologies Ltd.
Ducilo S.A.
Du Pont Canada Inc.
Du Pont Han Yang Pigments Ltd.
Du Pont—Idemitsu Co., Ltd.
Du Pont—MGC Co., Ltd.
Du Pont—MRC Company, Ltd.
Du Pont—Mitsui Fluorochemicals Company, Ltd.
Du Pont—Mitsui Polychemicals Company, Ltd.
Du Pont—Norol Maintenance Services A.S.
Du Pont—Sankyo Pharmaceuticals Co., Ltd.
Du Pont—Toray Company, Ltd.
Halocarburos, S.A. de C.V.
NIACHLOR
Nordisk Alkali Biokemi A/S
Oncogenetics Partners
PD Glycol Limited (Texas Partnership)
PD Magnetics B.V.
Philips and Du Pont Optical Company (PDO-U5)
Philips and Du Pont Optical Company (PDO-NL)
Pigmentos y Productos Quimicos, S.A. de C.V.
PROCOMP
Showa Neoprene K.K.
Societe En Nom Collectif Du Pont de Nemours (France) S.A. et Rhone-Poulenc Industries ("Butachimie SNC")
Syngas Company

AFFILIATES

Aviones B.C., S.A. de C.V.
Avtek Corporation
Biotech Research Laboratories, Inc.
Delaware River Cooperative
Derivados Sinteticos, S.A. de C.V.
Dunlena Pty. Limited
Gemeinnutzige Wohnungsbau GmbH
Haemonetics Corporation
ImagiTex Incorporated
La Domincia, S.A. de C.V.
Laserscope
Molecular Biosystems Inc.
National Housing Partnership
Nylon de Mexico, S.A.
Perceptive Systems Incorporated
POC Research
Quimica Fluor, S.A. de C.V.
Tetraetilo de Mexico, S.A.
Wilmington Trust Company

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

S.D. WARREN,
Petitioner

v.

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO LOCAL 1069,
Respondent

Civil No. 85-0321-P

CARTER, District Judge

OPINION

INTRODUCTION

In this action, S.D. Warren Company seeks to overturn, and the United Paperworkers Union seeks to enforce, an Arbitrator's decision to reinstate three employees who were discharged by the Company. The employees, Kimberly Denis, Deborah Graham and Linda Willoughby, were discharged in connection with an undercover investigation conducted at the Company, for violation of a rule contained in the Collective Bargaining Agreement prohibiting the possession, use or sale of marijuana on mill property. The Arbitrator sustained the grievances of these employees and directed the Company to reinstate them with full back pay, seniority and benefits but imposed unpaid suspensions of seven months, nine months and four months, respectively.[1] After reviewing the submissions regarding the Company's Motion to Vacate the Award, the Magistrate issued a Recommended Decision finding that while enforcement of the award did not violate public policy, the

[1] Marshall Buhelt, who was also a grievant in this proceeding, is now deceased. The Arbitrator denied his grievance and the Union did not seek to vacate the Arbitrator's decision.

Company's Motion should be granted on the basis that the Arbitrator had exceeded her authority. Both parties filed objections to the Recommended Decision, the Union in regard to the Magistrate's determination that the Arbitrator had exceeded her authority, and the Company in regard to the Magistrate's finding that the award did not violate public policy. After reviewing the record, the Court has determined that it must enforce the Arbitrator's award.

STANDARD OF REVIEW

This matter is not a pretrial motion and it is dispositive of the parties' dispute. Therefore, in reviewing the Magistrate's Recommended Decision this Court must make a *de novo* determination upon the record under 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). *See, e.g., Aluminum Company of America v. United States Environmental Protection Agency,* 663 F.2d 499 (4th Cir. 1981).

The standard under which a United States District Court may review an arbitration award is extremely narrow. In accordance with established policy, "[w]here parties to a collective bargaining agreement have provided for arbitration as the final and binding method for settling grievances the arbitration award is normally non-reviewable by a court." *Bettencourt v. Boston Edison Company,* 560 F.2d 1045, 1048 (1st Cir. 1977), *citing United Steelworkers v. Enterprise Wheel and Car Corporation,* 363 U.S. 593, 599 (1960) (herein *Enterprise Wheel & Car*). *See also* 29 U.S.C. § 173(d); 9 U.S.C. § 10. Therefore, a Court is bound to enforce an arbitral award unless the decision does not "draw its essence from the collective bargaining agreement." *W.R. Grace & Company v. Local Union 759,* 461 U.S. 757, 764, *citing Enterprise Wheel & Car,* 363 U.S. at 597.

In order to overturn an arbitration award, this Court must find, at a minimum, that the decision is "unfounded in reason and fact," "based on reasoning 'so palpably faulty that no

judge, or group of judges, could ever conceivably have made such a ruling,' " or "mistakenly based on a crucial assumption which is concededly a nonfact.' " *Bettencourt,* 560 F.2d at 1050 (citations omitted). Apart from matters specifically excluded by the parties "all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement." *United States v. Warrior & Gulf Navigation Company,* 363 U.S. 574, 581 (1960) (herein *Warrior & Gulf*).

I. Did the Arbitrator Exceed Her Authority Under the Collective Bargaining Agreement?

The Collective Bargaining Agreement between the parties sets out a dispute resolution process at Article 12, Section 4. The disputes to be covered by this process are "differences . . . as to the meaning or application of the provisions of th[e] Agreement." The Agreement provides that, if such a dispute is not resolved by several levels of internal procedure,

> the matter may be referred by either party to an arbitrator for decision, but it is agreed that the matter thus referred shall be concerned solely with the interpretation on and/or application of th[e] collective bargaining Agreement . . . The decision of the arbitrator shall be final and binding on the parties.

The Agreement further states that "the arbitrator shall have no power to render a decision which in any way adds to, subtracts from, or modifies any provision of the Agreement."

The Agreement also includes a "Management Rights" clause which states:

> The Company reserves the sole right to manage the business of the Company and its Cumberland Mills operation and to direct the working force. This right includes but is not limited to . . . the right to select, hire, assign, promote, demote, transfer, discipline, suspend or discharge employees for proper cause or to relieve them from duties because of lack of work or for other legitimate reasons.

The Agreement includes an employees' seniority provision stating that mill seniority ends upon "discharge for proper cause." The final provision relevant to this case is Mill Rule 7(a), which is included in Appendix A of the Agreement. It states:

> 7. Causes for Discharge
>
> In any organization, certain rules of conduct must be observed by the members for the good of all.
>
> Violation of prescribed rules are cause for disciplinary action of varying degrees of severity.
>
> Violations of the following rules are considered causes for discharge.
>
> a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. The possession or use of a specific narcotic or drug properly prescribed by a licensed physician is the only exception to this rule.

The Arbitrator conducted a hearing in this case and found the following facts: In October 1983 Agent Timothy Berry was hired by the Company under name "Al" Berry as an entry-level employee at the mill. Agent Barry was, in fact, acting as an undercover agent for the State Police Drug Unit. That agency reached an arrangement with S.D. Warren, prior to Agent Berry's employment at the mill, that he would make himself available to the Company for any administrative matter resulting from his work at the completion of the investigation. During this undercover operation, Agent Berry kept written reports which were eventually turned over to the Company and which formed the basis for the termination of twelve employees, including the grievants. The Reports disclosed, and the Arbitrator found to be proved beyond a reasonable doubt, that all three employees violated Mill Rule 7(a).

The Arbitrator found what might be termed "extenuating circumstances" in each of the three grievances she sustained. She found that Linda Willoughby was the first and only female

employee out of fifty-two employees in the "winder room," and was under continual pressure from the men to do her work faster. The Award states that, after five years of working under these circumstances Ms. Willoughby was advised by the Company physician to take an extended leave. Upon return, she was diagnosed as suffering from anorexia nervosa and was enrolled in the Company's Employee Assistance Program, designed to assist employees with personal problems. The Arbitrator found that Ms. Willoughby was approached by Agent Berry eight to twelve times in the eight-to-twelve-week period she knew him, and approached an additional four times in her work area on January 30, 1984. Prior to the last approach on January 30th, she was reprimanded by her foreman in regard to Berry's repeated visits during a period of time when Ms. Willoughby was supposed to be working. On the last approach, the Arbitrator found, Willoughby took a bag from her pocket, gave Agent Berry a small amount of marijuana, about enough for one marijuana cigarette, refused payment, and told him to leave her alone. The Company terminated her employment for possession of marijuana. The Arbitrator found credible Ms. Willoughby's testimony that she never used marijuana at work, noting her service on the Safety Committee and that she had previously suffered a work injury.

The Arbitrator found that Kimberly Denis was the only female employee in her area and that, while any coworker could make life difficult for her, she was especially dependent on her truck driver—for a period, Agent Berry—whose work could affect her bonus. The Arbitrator found that, after being approached three times, Ms. Denis agreed to try to get Agent Berry $20.00 worth of marijuana and to act as a "go-between," finding the marijuana for Berry from another employee at the plant. The Arbitrator stated, "Granted, Ms. Denis was in a vulnerable position. She was a woman half Berry's age working alone in an overwhelmingly male environment. She was in no position to risk alienating him, and she could not

avoid him. But she had not exhausted her alternatives . . ." Arbitrator's Award (herein "Award") at 33.

The Arbitrator found that Agent Berry approached Deborah Graham six or seven times about drugs and that she was justified in concluding that reporting Berry would accomplish little other than making an enemy of someone she would continue to have to work with. The Arbitrator characterized her position as a "damned-if-you-do-damned-if-you-don't" situation. The Arbitrator found that Ms. Graham sold Agent Berry four grams of marijuana for $30.00.

The Arbitrator determined that, although the employees had violated Rule 7(a), the Company was not justified in terminating their employment. In her conclusion, the Arbitrator explained that she was imposing heavy suspensions upon these three grievants in order to impress upon them the seriousness of their misconduct, but that in light of past disciplinary practice for similarly serious Mill Rule 7 violations, it was her determination that discharge was an excessively harsh punishment.

The Arbitrator rejected the Company's position that the plain meaning of the contract provides for immediate discharge in the instance of a violation of Mill Rule 7(a), Award at 19, and found that the Company's decision to terminate these employees was subject to arbitral review. The Arbitrator found that the contract did not unequivocally state that the conduct listed in Mill Rule 7(a) was *proper* cause for discharge as required by the Management Rights and Seniority Provisions. She reasoned that, while Rule 7 is entitled "Causes for Discharge," it does not say whether such cause "*will* be" or "*may* be" grounds for termination. She found that the explanatory sentences following the Rule 7 heading heightened, rather than clarified, the ambiguity of the title (e.g., violation of prescribed rules are cause for disciplinary action of varying degrees of severity," etc.). She further found that the Company's position was not supported by a reading of Mill Rule 7 in conjunction

with Mill Rule 8. Mill Rule 8 states that certain violations, other than those listed in Rule 7, are "Causes for Discharge after Appropriate Warning." The Arbitrator found that Rule 8 simply *guaranteed* a warning before an employee could be terminated for violating its provisions. It did not make clear that a warning would never be the appropriate discipline under the contract for a violation of Rule 7.

The Arbitrator also found that the Company's Safety Policy handbook, albeit a unilateral statement of the Company, did not remove the ambiguity of the Agreement. The handbook states:

> . . . violations of rules printed in red may mean immediate discharge. Violations of other rules *may* be cause for discharge after appropriate warning.

(Emphasis added.) Language tracking both Mill Rules 7(a) and 8(a), the latter of which, according to the Agreement, requires at least a warning prior to discharge, are printed in red.

Consequently, the Arbitrator concluded that Mill Rule 7 was ambiguous as to whether employees *must* be terminated and that it did not clearly state the agreement of the parties as to what constitutes proper cause for discharge. Since she found that the Rule was not an expression of the parties' agreement on what constituted proper cause, the Arbitrator determined that it was not an express exemption from the arbitral review process set out in the contract.[2]

The Magistrate found that the Arbitrator's conclusion ignored the plain meaning of the Agreement and therefore recommended that this Court vacate the award. *See Hoteles Condado Beach, L.A. Concha and Convention Center v. Union*

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[2] The Arbitrator further determined that past practice and bargaining history also did not support the Company's position that the meaning of the agreement plainly mandated discharge, and that the Company had not given sufficient notice of a change in policy.

de Tronquistas Local 901, 763 F.2d 34, 41 (1st Cir. 1985) *quoting Detroit Coil Company v. International Association of Machinists & Aerospace Workers, Lodge No. 82,* 594 F.2d 575, 579 (6th Cir. 1979) (an arbitator is without authority to disregard or modify plain and unambiguous provisions). The Magistrate determined that through the Management Rights clause of the Agreement the Company reserved the sole right to discharge employees for proper cause, and that Rule 7 unequivocally makes clear that a violation of its provisions, including subsection (a), is adequate cause for discharge, despite the use of differing language. In recommending vacation of the Arbitrator's award, the Magistrate rejected the union's reliance on *Super Tire Engineering Company v. Teamsters Local Union No. 676,* 721 F.2d 121 (3d Cir. 1983), and *Kewanee Machinery Division v. Teamsters Local 21,* 593 F.2d 314 (8th Cir. 1979), which tended to support the Union's position that the Company's decision to terminate these grievants was subject to arbitration.

After careful consideration the Court has determined that under the appropriate standard of review, as articulated by the United States Supreme Court, the First Circuit and other Circuit Courts of Appeal, this Court cannot accept the Magistrate's Recommended Decision to vacate the Arbitrator's award.

The issue here is whether, once the Arbitrator determined that the grievants had violated Mill Rule 7(a), she had authority under the contract to review the Company's chosen disciplinary action. It is the Court's task to determine whether the Arbitrator's construction of the contract provisions, and her resulting determination that the Company's penalty decisions are subject to arbitration, are contrary to the plain meaning of the contract.

The dispute resolution process in this Agreement covers "differences . . . as to the meaning or application of the provisions of this Agreement." Thus, the scope of the arbitration clause is broadly defined. In the context of ordering an

employer to arbitrate a dispute, the United States Supreme Court has made clear that exclusions from the arbitration process must be specific and unambiguous.

> An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage . . . "[S]trictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion.

Warrior & Gulf, 363 U.S. 582-83, 584.

The Company argues that the parties have agreed, as evidenced by Mill Rule 7, that the conduct of the grievants in this case constitutes proper cause for discharge. The Union argues that the contract provides that such conduct *may* be proper cause. The Arbitrator resolved this conflict by concluding that Mill Rule 7 does not unambiguously require dismissal or reserve penalty decisions to the Company. *See supra* at 7-8. In her discussion of whether she had authority to reduce the Company's chosen penalty, the Arbitrator relied on her lengthy discussion of the ambiguity of the relevant contract provisions. She concluded that based on the ambiguity of Mill Rule 7, there was no express restriction in the Agreement limiting her authority under the arbitration clause. Award at 30.[3] Under these conditions, she stated "it is well established that . . . [an arbitrator] has the authority to fashion a lesser

[3] This finding is predicated on a determination that Mill Rule 7 does not *require* the Company to discharge an employee who violates its provisions. The Arbitrator made such a finding based on her determination, *inter alia,* that the language of the Rule is ambiguous. *See supra* at 8. The same ambiguity which formed the basis for the Arbitrator's determination that the Rule does not require termination, provides the grounds for a finding that Rule 7 does not expressly remove a termination decision from arbitration.

penalty[.]" *Id.* This Court cannot say her reasoning was "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Bettencourt,* 560 F.2d at 1050.

In fact, the Court of Appeals for the Eighth Circuit did reach similar results in *Kewanee* and *Super Tire.* Although the contract in *Super Tire* did not include the exact language of the "management rights" clause in this case, it did provide that the offense committed by the employee in that case would be "cause for dismissal." In *Kewanee,* in addition to construing a shop rule and a contract provision, the arbitrator in *Kewanee* construed "Management Rights" and "proper cause" provisions, both part of the contract, which were very similar to those presented in this case. The Eighth Circuit held that the arbitrator had authority to construe the Management Rights provision, reserving to the company the "sole right to ... discharge employees" as subject to arbitral determination of proper cause. In contrast, in *Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977), relied on by the Company, the contract specifically states that the parties had agreed, prior to the fact, on what conduct constituted "just cause" for termination, exactly the term employed in describing the Company's rights under the contract.[4]

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[4] The Court notes that in the context of determining the ambiguity *vel non* of the contract, the Arbitrator stated that the Company, by choosing to retain discretion over discipline, gave "a third party neutral the same discretion when reviewing the propriety of those decisions." Award at 20. This statement, taken alone, is not necessarily correct. An employer may specify in a collective bargaining agreement that it has discretion over the degree of punishment warranted by employee violations and that such decisions are not subject to arbitral review (unless arbitrary and capricious). *See, e.g., Mistletoe,* 566 F.2d 692. However, this sentence does not invalidate the rest of the Arbitrator's analysis regarding the ambiguity of the contract or her reasoning that if Mill Rule 7 does not expressly

(Footnote continued on next page.)

In the instant case, the Court cannot vacate the Arbitrator's award because it would construe "cause" as equivalent to "proper cause," but must enforce the award if the Arbitrator's determination that the contract does not require dismissal or remove this issue from her jurisdiction is conceivably correct. In light of the conflicting authority on this issue, the Court must find that it is at least that.

II. Does the Award Violate Public Policy?

This Court accepts that portion of the Magistrate's recommendation (appended hereto as Exhibit "A") which concludes that the enforcement of this arbitration award does not violate public policy. In accepting the Recommended Decision, the Court also notes *Premium Building Products Company v. United Steelworkers of America, AFL-CIO,* 616 F. Supp. 512, 516 (N.D. Ohio 1985) (court cannot establish an across-the-board ruling that public policy requires that anyone caught smoking marijuana at their workplace is subject to discharge in all cases), which was issued a few days prior to *Misco, Inc. v. United Paperworkers International Union,* 768 F.2d 739 (5th Cir. 1985). In addition, the Court notes the dissenting opinion in *Misco,* 768 F.2d at 743 (Tate, J.).

Accordingly, the Company's Motion to Vacate the Award of the Arbitrator is hereby DENIED.

So ORDERED.

GENE CARTER
United States District Judge

Dated at Portland, Maine this 2nd day of April, 1986

(Footnote continued from preceding page.)

provide that possessing or selling marijuana on the job is proper cause for discharge, it is not an express exemption from arbitration of the Company's termination decision. *See* Award at 30.

EXHIBIT A

PUBLIC POLICY

If the district judge rejects the recommendation of the previous section that the arbitrator's interpretation of the contract is within her authority, such a conclusion would ordinarily end the matter and the arbitration award would be enforced. In a narrow class of cases, however, the courts have declined to enforce an arbitrator's interpretation of a contract because the contract as interpreted would be contrary to public policy. The United States Supreme Court has identified the standards for application of this narrow exception:

> If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obligated to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not the general consideration of supposed public interests."

W.R. Grace & Co., 461 U.S. at 766 (citations omitted). The Fifth Circuit Court of Appeals has applied his principle to deny enforcement of a contract interpreted by an arbitrator to require reinstatement of an over-the-road tractor-trailer who admitted drinking liquor on the job. *Amalgamated Meat Cutters v. Great Western Food Co.,* 712 f.2d 122 (5th Cir. 983). Federal Motor Carrier Safety Regulations explicitly prohibited the driver's conduct and required the employer to prevent it. This court, affirmed by the First Circuit Court of Appeals, declined to enforce a contract interpreted by an arbitrator to require reinstatement of a postal employee who admitted embezzling over $4,000 worth of money orders. *U.S. Postal Service v. American Postal Workers Union,* 736 F.2d 822 (1st Cir. 1984). In that case, the First Circuit pointed to several federal statutes exemplifying a federal policy regulating the conduct of postal employees and protecting the public in its use of the postal service. In *Local 453 v. Otis Elevator Company,* 314 F.2d 25 (2nd Cir. 1963), on the other hand, the court enforced a contract interepreted by an arbitrator to require reinstatement of a company employee who had violated a company rule

against gambling on the premises and who was convicted of a misdemeanor. The court found that the public policy represented by the New York statutory prohibition was vindicated by the criminal conviction and further vindicated by a 7-month, uncompensated layoff upheld by the arbitrator. The court found that no "greater vindication of the public condemnation of gambling" was required. 314 F.2d at 29.

The issue in these cases is most specifically *not* whether the court approves the employee's conduct or the arbitrator's remedy ordering reinstatement, but whether enforcing a contract between the parties that requires such reinstatement (for the arbitrator's decision is the binding interpretation of what the contract requires) violates an "explicit," "well defined and dominant" public policy exemplified by "laws and legal precendents." *W.R. Grace & Co., supra.*[9]

In that connection, Maine State law provides that possession of a "usable" amount of marijuana is a civil violation, subject to a fine of up to $200. 22 M.R.S.A. § 2383. Trafficking and furnishing, which in this case would amount to selling or giving away the marijuana, are Class D crimes, 17-A M.R.S.A. §§ 1103(2)(C), §§ 1106(2)(B), subject to imprisonment for less than one year and a fine of up to $1,000, 17-A M.R.S.A. § 152(2)(D), than one year and a fine of up to $1,000, 17-A M.R.S.A. § 1252(2)(D), 1301(B). Under federal law, possession is a misdemeanor with a penalty of imprisonment of not longer than one year, a fine of $5,000 or both, 21 U.S.C. § 844(a). Sales are felonies with penalties of up to five years imprisonment, up to $50,000 in fines, or both, 21 U.S.C. § 841(b)(1)(C), but a first offender possessing or distributing a small amount may avoid an adjudication of guilty and obtain probation for not longer than one year, 21 U.S.C. §§ 841(b)(4), 844(b)(1).

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[9] The Union attempts to have the court consider the conduct of the police undercover operation in its analysis of public policy. That conduct, however, plainly has no bearing on whether enforcment of the collective bargaining agreement, as interpreted by the Arbitrator, is contrary to public policy.

Thus, state and federal law provides only light penalties in connection with possession, furnishing, or distributing a small quantity of marijuana as is the case here. In Maine, possession is not even criminal, but a civil infraction. As a matter of federal law, if it is a first offense, an adjudication of guilty can be avoided. It is clear, moreover, that the policy of these states is directed to the public at large, not as in the *Amalgamated Meat Cutters* case to the specific category of over-the-road truckdrivers or as in the *U.S. Postal Service* case to the specific category of postal employees. Although the public policy of discouraging marijuana usage is clear, these statutes do not demonstrate a clear public policy preventing a company from agreeing with a union that it will discipline employees with lengthy periods of unpaid suspension but not outright dismissal if they violate a company rule on the subject.

I recognize that this conclusion is contrary to the decision reached recently by the Fifth Circuit Court of Appeals in *Misco, Inc. v. United Paperworks International Union,* 768 F.2d 739 (5th Cir. 1985).[10] There, the court declined to enforce an arbitration awarding interpreting the collective bargaining agreement to require reinstatement of an employee found in possession of marijuana and in the atmosphere of marijuana smoke in another person's car on the company lot. The court found the award to be "against well defined public policy—the Louisiana law against possession of marijuana and the public policy, embodied in the employer's rule, against introduction of drugs into the workplace and consequent operation of dangerous machinery by persons under their influence." 758 F.2d at 741. With all due respect to the Fifth Circuit's conclusion, I believe it fails to follow the standards set forth in *W.R. Grace, supra.* As stated in *Muschany v. United States,* 324 U.S. 49, 66 (1945) (a case referred to in *W.R. Grace, supra*), "[a]s the term 'public policy' is vague, there must be found definite

[10] *Misco* failed even to cite the *W.R. Grace* decision and based its analysis solely upon that provision of *Amalgamated Meat Cutters* which dealt with the danger of the truckdriver's conduct rather than the specific laws which had been violated.

indications in the law of the sovereignty to justify the invalidation of a contract as contrary to that policy." Thus, even though there may be a general state law against marijuana possession or usage, that does not demonstrate a well defined and dominant explicit public policy to prevent employers from agreeing that they will discipline their employees who violate that law in some way other than outright termination. *Misco*'s description of the risks to workplace safety when the dangerous machinery involved in that case and this case is used by those under the influence of drugs or alcohol involves "general consideration of supposed public interest" rather than the explicit laws and legal precedents required by *W.R. Grace*. The parties here have not cited the court to any statutory or regulatory statements requiring termination of employees like these. Indeed, Rule 8 of the Agreement, which is not challenged here, clearly provides that the Company has explicitly agreed to give warning to an employee who reports to duty *under the influence* of alcohol or narcotics rather than immediately terminate him or her. If a court's analysis of workplace safety is to govern the outcome, a court would have to be prepared to invalidate the explicit discipline provided by a rule like Rule 8 since an employee under the influence is far more imminently dangerous to workplace safety than the incidents here. Other caselaw from the Fifth Circuit has recognized that the duty or public of providing a safe workplace is not alone sufficient to justify a court in voiding a collective bargaining agreement as interpreted by an arbitrator. *Johns-Manville Corp. v. International Ass'n of Machinists*, 621 F.2d 756 (5th Cir. 1980).

I, therefore, conclude that the contract is interpreted by the Arbitrator is not contrary to public policy.[11]

DATED at Portland, Maine, this 17th day of January, 1986.

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[11] I would reject the Company's argument, Petition for Vacation of Award of Arbitration, P15, that the award must be vacated because "the Arbitrator refused to accepted and consider relevant judicial precedent published after filing of post hearing briefs with the Arbitrator (and so refused to consider S.D. Warren's reply brief) . . . ." The Arbitrator like a court, must be able to invoke cloture on proceedings so that she may issue a decision.

I have not addressed the argument whether the Arbitrator improperly declined to consider certain evidence or whether she properly interpreted the so-called *Greenlaw* award, a previous arbitral decision involving the Company and the Union.